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June 19, 2017

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Submitted via electronic mail

Re: Comments of the States of West Virginia, Wisconsin, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Utah, and the Commonwealth of Kentucky on the U.S. Environmental Protection Agency's request for comment on the definition of "waters of the United States."

Dear Administrator Pruitt:

As representatives of our States, we urge the Environmental Protection Agency ("EPA") to adopt a definition of "waters of the United States" under the Clean Water Act of 1972 ("CWA") that preserves the important role of the States in protecting the nation's water resources.

In 2015, the EPA and the U.S. Army Corps of Engineers (the "Corps") (collectively the "Agencies") adopted the WOTUS Rule, *see* "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015), which came under immediate challenge. Thirty States, including the signatories of this letter, and other parties sought judicial review, resulting in orders from two federal courts staying implementation of the WOTUS Rule. The WOTUS Rule is unlawful because it conflicts with both the CWA's text and the U.S. Supreme Court precedent concerning the CWA and because it significantly impinges upon the States' traditional role as the primary regulators of land and water resources within their borders.

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Now the Agencies have an opportunity to pursue a lawful rule that adheres to the text of the CWA and U.S. Supreme Court precedent. We are encouraged by EPA's outreach to state and local governments at this early stage in the process of replacing the Rule, and we urge EPA to continue to engage with States throughout the rulemaking process. We write to suggest how the Agencies can write a rule that respects Congress's instruction in the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" 33 U.S.C. § 1251(b). In particular, we urge EPA and the Corps to adopt an approach consistent with Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), as urged by the President's recent executive order. Indeed, many of the undersigned States believe that Justice Scalia's plurality opinion identifies the outermost bound of permissible federal jurisdiction authorized by the statute, and many of the undersigned States would consider bringing another legal challenge against any regulatory definition of "waters of the United States" that exceeds the scope defined by Justice Scalia's plurality opinion. In the alternative, if EPA and the Corps wish to adopt an approach tailored to Justice Kennedy's *Rapanos* concurrence—which the States do not believe is necessary, and many States believe would be unlawful and plainly in excess of EPA's statutory jurisdiction—the States urge that any such approach should be carefully tailored to addressing the concerns that Justice Kennedy raised regarding federalism and the traditional authority of the States as principal regulators of waters within their borders.

I. Background

A. The Clean Water Act

The CWA provides that the Agencies have regulatory authority over "navigable waters," defined as "waters of the United States," 33 U.S.C. §§ 1344, 1362(7), which triggers numerous regulatory requirements. Any person who causes pollutant discharges into "waters of the United States" must obtain a permit under the section 402 National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, or under section 404 of the CWA for dredged or fill material, *id.* § 1344, subject to certain exclusions. "The discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," and "pollutant" is defined broadly to include not only traditional contaminants but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt." *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (citing 33 U.S.C. §§ 1362(12), 1362(6)). Obtaining a permit is an expensive process that can take years and cost tens of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344. Discharging into "waters of the United States" without a permit can subject a farmer or private homeowner to criminal and civil penalties, including fines of up to \$51,570 per violation, per day. 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

Federal jurisdiction under the CWA also imposes costs specially on the States. Some of those costs relate to permitting under the CWA. In forty-six States, it is the States and not the federal government that have primary NPDES permitting responsibilities under 33 U.S.C. § 1342(b). NPDES Program Authorizations, <https://www.epa.gov/npdes/npdes-program-authorizations> (last visited May 24, 2017). In addition, all States must create water quality

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standards for those “waters of the [United] State[s]” within their borders, 33 U.S.C. § 1313, and States must issue water quality certifications for every federal permit that is issued by EPA or the Corps within their borders. *Id.* § 1341. Every two years, States also must report to EPA on the condition of those waters, *id.* § 1315, and if waters do not meet their designated standards, the States must develop detailed pollution diets for those waters and submit those diets to EPA for approval, *id.* § 1313(d).

Importantly, the States have robust programs to protect their own waters, regardless of whether those waters are regulated under the CWA. *See, e.g.*, N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.*

B. Supreme Court Decisions Rejecting The Agencies’ Overbroad Interpretations Of “Waters Of The United States”

Twice in the last sixteen years, the Supreme Court has rejected attempts by EPA and the Corps to extend their jurisdiction beyond the CWA. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), the Supreme Court rejected the Corps’ assertion of jurisdiction over waters “[w]hich are or would be used as habitat” by migratory birds. *Id.* at 164. The Court concluded that the CWA does not reach “nonnavigable, isolated, intrastate waters,” such as seasonal ponds. *Id.* at 171. The Court explained that “federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use,” *id.* at 174, and it required “a clear indication that Congress intended that result,” *id.* at 172. But the Court found no clear statement authorizing the Corps’ expansive view; to the contrary, “Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources’” 33 U.S.C. § 1251(b).

Next, in *Rapanos*, the Supreme Court rejected the Corps’ assertion of authority over intrastate wetlands that are not significantly connected to navigable-in-fact waters. The Court’s majority consisted of a four-Justice plurality opinion written by Justice Scalia and Justice Kennedy’s opinion concurring in the judgment.

Pointing to several sources for statutory construction, the plurality concluded that, “on its only plausible interpretation,” CWA jurisdiction extends “only [to] those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster’s New International Dictionary* 2882 (2d ed. 1954)), and “wetlands with a continuous surface connection to” those waters, *id.* at 742. Specifically, the plurality based this conclusion on “[t]he only natural definition of the term ‘waters,’ [the Court’s] prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and th[e] Court’s canons of construction.” *Id.* at 731.

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In his separate opinion, Justice Kennedy also rejected the Corps' broad assertion of authority but on a different ground, stating that the Agencies only have authority over waters that are navigable-in-fact and waters with a "significant nexus" to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (citing *United States v. Appalachian Power Co.*, 311 U.S. 377, 407–08 (1940)). On Justice Kennedy's analysis, a water has a "significant nexus" if it "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water. *Id.* at 779–80. Accordingly, Justice Kennedy rejected jurisdiction over all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776; *see also id.* at 769 ("merest trickle, [even] if continuous" is insufficient." *Id.* at 780. Justice Kennedy explained that the Corps' approach "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778.

In the years since *Rapanos*, the courts of appeals have disagreed over the controlling effect of the two opinions composing the majority. Under *Marks v. United States*, 430 U.S. 188 (1977), "[w]hen a fragmented Court decides a case[,] . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 193 (citation omitted). In conducting the *Marks* analysis of *Rapanos*, the courts of appeals have reached different results. Compare *United States v. Donovan*, 661 F.3d 174, 176 (3d Cir. 2011) (holding the Agencies may assert jurisdiction over waters that satisfy either test), *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (same), and *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (same), with *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (holding Justice Kennedy's test governs), *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (same), and *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (same).

C. Two Federal Courts Block The WOTUS Rule As Unlawful And Harmful To The States

In June 2015, EPA and the U.S. Army Corps of Engineers ("Corps") (collectively "the Agencies") issued the final Clean Water Rule: Definition of "Waters of the United States" ("WOTUS Rule"), 80 Fed. Reg. 37,053 (June 29, 2015). The WOTUS Rule asserted sweeping jurisdiction over usually dry channels occasionally carrying "[t]he merest trickle[s]" into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The WOTUS Rule also covered waters merely because they are somewhat near such a dry channel and land features that connect to navigable waters only, if ever, after a once-in-a-century rainstorm.

Our States, among others, filed suit in various federal courts because the WOTUS Rule violates the CWA, the Administrative Procedure Act, and the U.S. Constitution.¹ The WOTUS

¹ *See Murray Energy Corp. v. EPA*, No. 15-3887 (and consolidated cases) (6th Cir.); *North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D. filed June 29, 2015); *Ohio v. U.S. Army Corps of*

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Rule violates the CWA under either the *Rapanos* plurality or Justice Kennedy's concurrence. And even if the WOTUS Rule were not prohibited by the Supreme Court's clear directives, it is unlawful because it is not clearly permitted by the language of the CWA. As the Supreme Court held in *SWANCC*, federal regulation of vast numbers of local land and water features within the core state function requires a clear statement from Congress. Moreover, the Agencies adopted the WOTUS Rule in violation of the Administrative Procedure Act by adopting five distance-based components and one unduly narrow exclusion never even arguably presented in the Agencies' proposed rule and lacking record support. Finally, the WOTUS Rule violates the Constitution by intruding on the States' reserved authority under the Tenth Amendment and exceeding Congress's authority under the Commerce Clause.

Reflecting the strength of these challenges, the WOTUS Rule has been stayed by two federal courts. The day before the WOTUS Rule's effective date, the U.S. District Court for the District of North Dakota stayed implementation of the Rule in thirteen plaintiff-States pending judicial review of the Rule. *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D. N.D. 2015). Then on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed implementation of the WOTUS Rule nationwide, finding that the Rule was likely unlawful. *In re EPA*, 803 F.3d 804 (6th Cir. 2015).²

D. The Executive Order Instructing the Agencies to Rescind or Revise the Rule and EPA's Plan to Implement the Executive Order.

In February 2017, the President issued an Executive Order instructing EPA and the Corps to review the WOTUS Rule and issue for notice and comment a proposed rule revising or rescinding the rule as appropriate. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Order further instructs the Agencies to consider interpreting the term "navigable waters" as defined in 33 U.S.C. § 1362(7) in the Clean Water Act consistent with the plurality opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Agencies have adopted a two-step approach for implementing the Executive Order. First, the Agencies intend to propose withdrawing the WOTUS Rule and re-promulgating the 1986 rule. Second, the Agencies will propose a new definition of "waters of the United States"

Eng'rs, No. 2:15-cv-2467 (S.D. Ohio filed June 29, 2015); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. filed June 29, 2015); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga. filed June 30, 2015); *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Okla. filed July 8, 2015).

² The Sixth Circuit also decided that it had jurisdiction to consider challenges to the WOTUS Rule in the first instance under 33 U.S.C. § 1369(b)(1). *In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of the U.S.*, 817 F.3d 261 (6th Cir. 2016). In September, 2016 the National Association of Manufacturers filed a petition for a writ of certiorari with the United States Supreme Court appealing that decision. The U.S. Supreme Court granted the petition. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 137 S. Ct. 811 (Jan. 13, 2017). The case has not yet been scheduled for oral argument.

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consistent with Justice Scalia's *Rapanos* opinion. EPA has sought comment from state and local government on the federalism aspects of a new definition.

II. Discussion

As officials from States, we write to explain how the Agencies should define "waters of the United States" consistent with the role that States currently play in the management of land and water use.

As a threshold matter, we think there are good arguments that federal jurisdiction under the CWA extends only to navigable waters. The text of the CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). And "[f]or a century prior to the CWA, [the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality opinion) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). That reading also links federal jurisdiction under the CWA with Congress's constitutional authority to regulate commerce "among the several States," U.S. Const. art. I, § 8, cl. 3, which is conducted through navigable waterways.

However, in light of the Supreme Court's decision in *Rapanos*, it may be appropriate for the Agencies to look to the views of the Justices who made up the controlling majority in that case. As between the views expressed by those Justices, we urge the Agencies to adopt a rule defining "waters of the United States" in the manner identified in Justice Scalia's plurality opinion because that approach is more consistent with the text and purpose of the CWA. Indeed, as noted above, many of the undersigned States believe that the Agencies' jurisdiction to regulate "waters" extends no farther than Justice Scalia's plurality opinion in *Rapanos*, and those States likely would challenge any regulatory definition drawn from Justice Kennedy's concurrence in *Rapanos*. Alternatively, should the Agencies decide to take the approach of Justice Kennedy's concurrence, over the undersigned States' objections, we respectfully urge the Agencies to take into account the extent to which the States already protect land and water resources within their borders.

A. The Agencies Should Adopt the Scalia Plurality Test as Their Approach to CWA Jurisdiction.

The Agencies should base their approach on the *Rapanos* plurality because it better comports with the text of the CWA. Such a rule would provide for federal jurisdiction over "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) and "wetlands with a continuous surface connection to" those waters, *id.* at 742 (Scalia, J., plurality). As the plurality explained, this conclusion follows from several sources of statutory construction.

For example, the plurality focused on Congress's use of the term "the waters"—in particular, "[t]he use of the definite article ('the') and the plural number ('waters')." *Id.* at 732. This term refers "plainly" not to "water in general" but "more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes.'" *Id.* at 732 (quoting Webster's New International Dictionary 2882 (2d ed. 1954)). These are all "continuously present, fixed bodies of water," and not "ordinarily dry channels through which water occasionally or intermittently flows," such as "transitory puddles or ephemeral flows of water." *Id.* at 733.

In addition, the plurality determined that the CWA's use of the term "navigable waters" further confirmed that jurisdiction is limited to "relatively *permanent* bodies of water." *Id.* at 734 (emphasis in original). That is because the CWA "adopted that traditional term from its predecessor statutes," and the "traditional understanding" of the term "navigable waters" included only "discrete *bodies* of water." *Id.*

The plurality also found "[m]ost significant of all" that the CWA itself categorizes channels that carry intermittent flows of water, such as pipes, ditches, channels, tunnels, conduits, and wells, as "point sources" and not "navigable waters" *Id.* at 735. The plurality highlighted the CWA's definition of "discharge of a pollutant," which uses the terms "point sources" and "navigable waters" as distinct categories. Under the statute, a "discharge of a pollutant" consists of "any addition of any pollutant *to* navigable waters *from* any point source." As the plurality explained, this definition "would make little sense if the two categories"—point source and navigable waters—"were significantly overlapping." *Id.*

Finally, the plurality explained that even if there were ambiguity as to the meaning of "waters of the United States," the *SWANCC* clear statement rule would prohibit the Corps' interpretation. *Id.* at 737–38. The extensive federal jurisdiction would allow the federal government to exercise the "quintessential state and local power" of regulating "immense stretches of intrastate land." *See id.* at 738. The plurality explained that as in *SWANCC*, it would expect a clear statement from Congress authorizing such an "intrusion into traditional state authority." *Id.*

The test that Justice Scalia's plurality opinion proposed also forwards the CWA's purpose of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . ." 33 U.S.C. § 1251(b). This approach would preserve the role of the States as the primary regulators of land and water resources by allowing for federal jurisdiction over only relatively permanent bodies of water. The definition leaves within state control local non-navigable intrastate topographical features that most benefit from the "local policies 'more sensitive to the diverse needs of a heterogeneous society,'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Those features vary greatly across the country from dry arroyos in New Mexico to ephemeral drainages in Wyoming to swales in Ohio farmland to prairie potholes in North Dakota to thousands of square miles of Alaskan land that is frozen most of the year. The States take very seriously the task of

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preserving the land and water resources within their borders consistent with local needs and act accordingly to protect those resources.

B. If the Agencies Reach Waters Beyond the Plurality Test, They Should Carefully Consider the Extent to Which the States Already Protect Those Waters.

Though we believe the Agencies should adopt the plurality approach, we recognize that the Agencies may conclude that they want to rely upon Justice Kennedy's concurrence. To be clear, we do not believe that the Agencies should do so, and many of the undersigned States likely would challenge such approach in Court. But should the Agencies nevertheless decide to follow such an approach, over the objections of the undersigned States, we urge them to carefully consider, at the very least, the extent to which States already fully protect these waters under state law and to build any approach around that understanding.

In particular, to the extent the Agencies extend jurisdiction under Justice Kennedy's approach, in order to remain true to that approach, they should do so only where the Agencies have determined that the State's permitting program has failed with respect to a particular body of water, such that *the water* would—unless subject to federal regulation—have a significant, detrimental effect on the “chemical, physical, and biological integrity” of navigable waters. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). The reason for this approach is that regulation of non-navigable waters is *only* justified under Justice Kennedy's approach in order to *protect* navigable waters that are the subject of interest under the CWA. *Id.* If a state is *already* adequately protecting those non-navigable waters, such that there is no significant impact on the “chemical, physical, and biological integrity” of navigable waters, no possible rationale for imposing federal regulatory control over that water exists.

In order to implement Justice Kennedy's approach rigorously and consistent with the CWA's respect for state primacy over local water and land use planning, a three-step inquiry would be required to remain true to Justice Kennedy's approach. *First*, the Agencies should be required to make an initial determination that the State's permitting program has failed to regulate a water to such a degree that it would, unless subject to regulation under the CWA, “significantly affect the chemical, physical, and biological integrity of” navigable waters. That finding would consist of defining a water that the State has failed to protect. Then the Agencies would need to show that the State's failure to regulate that water significantly would affect the chemical, physical, and biological integrity of navigable waters, unless that water were made subject to CWA oversight. *Second*, the Agencies should be required to provide the State with the opportunity to challenge the determination through an administrative process. Specifically, the State should have the right to file an administrative appeal and participate in a hearing on the matter. *Third*, the State should have the opportunity to file and complete an appeal of the decision by the Agency to a federal court before the designation would take effect.

Such an approach would at least begin to recognize important federalism principles. Again, the CWA was designed to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .” 33

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U.S.C. § 1251(b). This approach would allow the States some flexibility to design state law in order to protect the water resources within their borders. It also would provide any State for which EPA attempts to designate certain waters an opportunity to explain to EPA why its regulatory program is sufficient to protect those waters and contest EPA's determination that those waters significantly affect navigable waters. And it would allow the State to challenge such a determination in a federal court before the Agencies assert jurisdiction based on the determination. These important safeguards would go some way to protecting state interests against broad assertions of federal authority, such as those claimed in the WOTUS rule, that violate the CWA and impinge on the States' traditional authority over land and water use. Again, however, we believe that the plurality opinion in *Rapanos* establishes the outermost bound of permissible federal jurisdiction under the law.

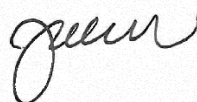
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We appreciate this opportunity to provide our views on this important matter to the Agencies. We encourage the Agencies to continue to engage with States and state agencies throughout the rulemaking process. We look forward to working with the Agencies in the future on these important issues for the citizens of our States.

Sincerely,



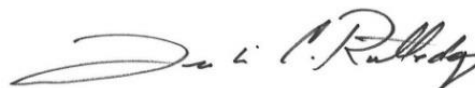
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A handwritten signature in black ink that reads "Ken Paxton". The letters are cursive and fluid.

Ken Paxton
Texas Attorney General

A handwritten signature in black ink that reads "Sean D. Reyes". The signature is highly stylized and cursive.

Sean D. Reyes
Utah Attorney General