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

Re: Proposed Rule on Definition of "Waters of the United States" under the Clean Water Act; Docket ID No. EPA-HQ-OW-2011-0880

To Whom It May Concern:

I write to offer comments on the Proposed Rule issued by the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") defining "waters of the United States" under the Clean Water Act ("CWA"). (79 Fed.Reg. 22187 (2014).)

THE PROPOSED RULE EXPANDS "WATERS OF THE UNITED STATES" BEYOND CONGRESS'S INTENT IN THE CLEAN WATER ACT

A. Clean Water Act And Regulations

Congress enacted the Clean Water Act ("CWA") to authorize the Environmental Protection Agency and Corps of Engineers to regulate discharges of pollutants from point sources into "navigable waters" in order to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." (33 U.S.C. §1251(a).) It defined the "navigable waters" within the agencies regulatory jurisdiction as "waters of the United States, including the territorial seas." (33 U.S.C. § 1362(7).)

The EPA and Corps, in turn, elaborated on this definition in their regulations, which defined "waters of the United States" to include various types of waters as well as certain "wetlands." (33 C.F.R. § 328.3; 40 C.F.R. § 122.2.) In doing so, the agencies aimed to extend their regulatory reach under the CWA to "all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily

obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act." (42 Fed.Reg. 37122, 37144 n.2 (1977).)

As the agencies' regulatory program has gradually expanded over the landscape during the last several decades, it has been dogged by questions of its legitimacy. One of those questions has concerned whether the U.S. Constitution empowers the federal government to regulate isolated waters and wetlands. The Constitution, after all, confers only limited powers on the government, among which is the power to regulate foreign and interstate commerce. The agencies answered this question in the mid-1980s with what became known as the "migratory bird rule," asserting that they could regulate any waters that are used by migratory birds or endangered species. (Memorandum from Francis S. Blake, General Counsel, EPA, to Richard E. Sanderson, Acting Asst. Administrator, Office of External Affairs, EPA re Clean Water Act jurisdiction over isolated waters (Sept. 12, 1985); 51 Fed.Reg. 41206, 41217 (1986).)

B. Supreme Court Decisions

In 1985, the justices of the Supreme Court joined in laughter over the then-new migratory bird rule upon hearing of it during oral argument of the Court's first CWA wetland case, *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985), but refrained from discussing the issue then, holding in that case that the CWA could reasonably be interpreted to authorize the Corps to regulate wetlands that actually abutted a navigable waterway. The Court reasoned that Congress recognized that delimiting "waters of the United States" calls for a line to be drawn between land and water, delegated the line-drawing function to the Corps and EPA, and thereby authorized the agencies reasonably to choose a line that encompasses within "waters of the United States" the "adjacent" wetlands. The Court did not accept the government's invitation to interpret the CWA, as some lower courts had, to reach as far as the Commerce Clause of the Constitution allows.

Sixteen years later, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the Supreme Court took up the question of "isolated" waters and held, 5-4, that "the 'Migratory Bird Rule' is not fairly supported by the [CWA]." The Court questioned whether the commerce power extended as far as the Corps supposed, but deferred answering that question, holding that in any event Congress never intended to regulate non-navigable, isolated, intrastate waters when it enacted the CWA. Pointing to the statutory term "navigable waters," the Court noted that it held in *Riverside* that "the term 'navigable' is of 'limited import' and that Congress evidenced its intent to 'regulate at least some waters that would not be deemed "navigable" under the classical understanding of

that term.'" "But it is one thing to give a word limited effect," said the Court, "and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." Accordingly, the Court held that the Corps' regulation defining "waters of the United States" to include non-navigable, isolated, intrastate waters and wetlands, as applied to the *SWANCC* site under the migratory bird rule, exceeds the authority granted to the Corps under the CWA.

After *SWANCC*, greater attention was focused on what it means to be "adjacent" to (or "isolated" from) navigable waters. New importance was found in characterizing various channels as "tributaries" of navigable waters. After all, the more such tributaries found on the landscape, the more wetlands may be found "adjacent" to those tributaries. Roadside ditches and sundry other features capable of conveying water when present, which once could not without embarrassment have been dubbed "tributaries," came to be seriously regarded as such by some.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court confronted the Corps' claims that four wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters constitute "waters of the United States." The trial and appellate courts upheld the Corps' claims, and the landowners petitioned the Supreme Court to review the cases.

The Court divided into three camps. While five justices agreed that the Corps had exceeded the authority granted by Congress in the CWA and, accordingly, vacated the judgments and remanded the cases to the lower courts for further proceedings, the justices came to this conclusion for different reasons. Four rejected the Corps' jurisdictional claims, reasoning that the CWA extends only to relatively permanent, standing or continuously flowing bodies of water and wetlands directly connected to them; a fifth concurred that the Corps' claims were excessive, but opined that the CWA extends to wetlands with a "significant nexus" to truly navigable waters. Four other justices dissented, characterizing the Corps' view as a "reasonable interpretation" of the CWA.

Writing for a plurality of four, Justice Scalia interpreted the CWA to encompass much less than the Corps has asserted for more than three decades. Noting that Congress defined "navigable waters" as "the waters of the United States," the plurality found it unnecessary to decide the precise extent to which the qualifiers "navigable" and "of the United States" restrict the coverage of the CWA since, at the very least, the Act authorizes jurisdiction only over "waters." That term, they maintained, "cannot bear the expansive meaning that the Corps would

give it." (*Id*. at 732.) As they put it, "[t]he use of the definite article ('the') and the plural number ('waters') show plainly that [the CWA's definition] does not refer to water in general." (*Id*.) "In this form," the plurality declared, "'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" (*Id*.) Citing Webster's New International Dictionary, they added that this definition includes "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' [as well as] wetlands with a continuous surface connection to [such] bodies . . . so there is no clear demarcation between 'waters' and wetlands . . . ." (*Id*. at 732-733.) By the plurality's reckoning, "[i]n applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody." (*Id*. at 734.)

Justice Kennedy concurred that the cases should be remanded, but not for the reasons advanced by the plurality. He agreed that the Corps' treatment of any channel that "feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark" as a "tributary" subject to regulation under the CWA is overly broad—so broad, he noted, that it "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it." (*Id*. at 781.) He agreed, too, that "mere hydrological connection [to navigable waters] should not suffice in all cases" to render a wetland or channel a "water of the United States" since "the connection may be too insubstantial for the hydrological linkage to establish the required nexus with [traditional] navigable waters." (*Id*. at 784.) Criticizing the dissent for reading the word "navigable" to have no importance in the CWA, he observed that "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually flow into traditional navigable waters." (*Id*. at 778-779.) "The deference owed to the Corps' interpretation of the statute," he concluded, "does not extend so far." (*Id*. at 779.)

Justice Kennedy's reasoning, though, differed markedly from that of the plurality. Focusing on the Court's observation in *SWANCC* that "[i]t was the significant nexus between wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*" (*id*. at 767), Justice Kennedy decided that such a nexus should be the touchstone of jurisdiction over wetlands under the CWA:

> Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. . . . Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

(*Id*. at 779-780.) When the Corps seeks to regulate wetlands adjacent to nonnavigable tributaries, Justice Kennedy added, it "must establish a significant nexus on a case-by-case basis" at least until "more specific regulations" are adopted. (*Id*. at 782.)

The plurality, as well as the dissent, panned Justice Kennedy's "significant nexus" test as a judicial innovation derived from a misreading of *SWANCC*. Justice Scalia observed that the term "significant nexus" is not used in the CWA (*id*. at 755) and is used in *SWANCC* only to "refer[] to the close connection between waters and the wetlands that they gradually blend into," as in *Riverside* where the wetlands actually abutted a navigable water (*id*. at 741). By Justice Scalia's reading of *Riverside* and *SWANCC*, "[w]etlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States." (*Id*. at 755, emphasis in original.) "What other nexus," he asked, "could *conceivably* cause them to *be* 'waters of the United States'? . . . What possible linguistic usage would accept that [as Justice Kennedy's test proposes] whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States." (*Id*., emphasis in original.)

Justice Stevens, writing for the four dissenters, viewed the case as "straightforward." (*Id*. at 788.) The Corps, he observed, had determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of the nation's waters in many ways. "The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States,'" he concluded, "is a quintessential example of the Executive's reasonable interpretation of a statutory provision." (*Id*.)

Seeing Justice Kennedy's "significant nexus" as a "judicially crafted rule" by which "our passing use of this term [in *SWANCC*] has become a statutory requirement" (*id*. at 807), he added:

> I think it clear that wetlands adjacent to tributaries of navigable waters generally have a "significant nexus" with the traditionally navigable waters downstream. Unlike the "nonnavigable, isolated, intrastate waters" in *SWANCC*, . . . these wetlands can obviously have a cumulative effect on downstream water flow by releasing water at times of low flow or by keeping water back at times of high flow. This logical connection alone gives the wetlands the "limited" connection to traditionally navigable waters that is all the statute requires. . . .

(*Id*. at 808.)

C. Proposed Rule

1. Proposed Rule Is Fundamentally Flawed In That It Is Predicated On Kennedy's Plainly Wrong "Significant Nexus" Invention

The EPA and Corps have made Justice Kennedy's "significant nexus" invention the touchstone for CWA jurisdiction in their Proposed Rule. (79 Fed.Reg. 22188, 22192, 22263.) Because that notion does not remotely reflect Congress's intent in the CWA, the Proposed Rule is fundamentally flawed.

Justice Kennedy's "significant nexus" idea is plainly wrong. First, as noted above, Justice Kennedy is the only justice on the Supreme Court who gives any credence to the idea. Moreover, this is not a circumstance where Justice Kennedy simply is the only one who has voiced approval of the idea while the others have expressed no opinion. To the contrary, all eight other justices have explicitly rejected the "significant nexus" notion as an invention solely of Justice Kennedy's making and not grounded in the CWA.

Second, the rejection of the "significant nexus" idea by eight justices operates with particular force in this instance because Justice Kennedy claims to derive the idea not from text in the CWA fashioned by Congress, but rather from text in an earlier Supreme Court decision, *SWANCC*, fashioned by the justices themselves. Among the eight justices who told Justice Kennedy in *Rapanos* that he misinterpreted the Court's use of the "significant nexus" phrase in *SWANNC*, six participated in that case. One can reasonably presume that they know their own meaning—and that meaning is not what Justice Kennedy says.

Third, there is no justification in law or logic to treat the view of one justice expressly rejected by all the others as the law of the land. This intuitively obvious conclusion is not in the least clouded or contradicted by any Supreme Court precedent on how to deal with fractured decisions in which no single opinion is supported by a majority of justices.

Some lower courts have looked to *Marks v. United States*, 330 U.S. 188 (1977), for guidance. In that case the Court noted:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."

(*Id*. at 193.)

The various rationales offered by different justices in *Rapanos* though are not linear or logical subsets that lend themselves to identifying some "narrowest grounds" of the sort the *Marks* Court had in mind. If anything, the *Rapanos* plurality opinion is the closest to a narrowest ground in the sense that it generally encompasses the narrowest range of waters—a range that Justice Kennedy (as well as the four dissenters) would agree is within the scope of what Congress intended. Certainly, *Marks* does not warrant resorting to some simple vote-counting exercise. Even less does it justify employing a vote-counting rationale producing the perverse result that a single justice's view expressly rejected by all the other justices should be treated as the law of the land.

As the agencies have predicated the Proposed Rule on a single justice's misunderstanding of the Court's own words rather than any provision developed by Congress, they have no reason to expect the Court to accord deference to their rulemaking if and when the Court later reviews it. (See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).)

2. Even If Kennedy's "Significant Nexus" Notion Properly Served To Determine Which Wetlands Are Part Of Jurisdictional Waters, It Has No Bearing On Determining Whether Waters Themselves Are Jurisdictional

As noted above, the *Riverside* Court brushed aside the government's assertion that wetlands "adjacent" to waters of the United States should fall within CWA jurisdiction because

Congress intended the Act to reach as far as the commerce power allows and, instead, held that Congress delegated to the agencies the function of drawing a line between land and water and the agencies' decision to include "adjacent wetlands" on the water side of the line was reasonable. The *SWANCC* Court later observed that it was the "significant nexus" between wetlands and navigable waters that informed its reading of the CWA in this regard. (*SWANCC*, 531 U.S. at 167 (2001).) In his concurring opinion in *Rapanos*, Justice Kennedy treated this observation as a test of sorts to determine which particular wetlands are sufficiently related to navigable waters to be embraced within such waters when the agencies draw the line separating land and water. (*Rapanos*, 547 U.S. at 759-787.)

Without explanation or justification, the agencies propose to repurpose the phrase "significant nexus" to serve as some sort of standard by which all waters are determined to be jurisdictional or not. Justice Kennedy, though, had no such purpose in mind when he devised his test for determining whether wetlands should be treated as jurisdictional waters. Indeed, the line-drawing rationale underlying his concurring opinion in *Rapanos* and the Court's unanimous decision in *Riverside* has no bearing and no plausible application to the determination whether waters themselves are subject to the agencies' regulatory jurisdiction under the CWA.

The closest the agencies have come to explaining their attempt to use the "significant nexus" phrase in a way and context unrelated to how Justice Kennedy used it is to baldly assert: "While Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries." (79 Fed.Reg. 22188, 22204.) Why the agencies suppose this to be "reasonable," they do not say. Certainly, the line-drawing rationale has no application apart from ascertaining whether particular wetlands are part of waters, so how and why it is reasonable to "utilize" the significant nexus term in other contexts for other purposes is not apparent.

Moreover, removing the phrase from the context of drawing a line between land and water and proposing to use it for some different purpose raises questions about what the agencies suppose the phrase should mean in this different context. In repurposing the phrase, the agencies have rendered its meaning uncertain—even more uncertain than it already was.

In the process, the agencies have fashioned a rule that effectively reaches for the outer limits of the commerce power notwithstanding the Supreme Court's repeated rejection of that rationale. As the agencies explain:

> The agencies also propose that all waters that meet the proposed definition of tributary are ''waters of the United States'' by rule, unless excluded under section (b), because tributaries and the ecological functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

(79 Fed. Reg. 22201.) The problem with this approach is that it includes too much. *Uplands* significantly affect waters of the United States. Rain falls on the land, flows across the land, and washes substances on the land into the waters. Rain washes into traditionally navigable waters dog droppings off urban streets, cow droppings off agricultural fields, and bear droppings from the woods. Rainwater flowing across the land—that is, across *uplands*—carries bacteria, nutrients, other organic matter, and sediment to these navigable waters, each of which under natural conditions contributed to the natural condition of the receiving water. When a drainage basin is developed, the types, amounts, and proportions of materials carried into traditionally navigable waters may change. The purpose of the stormwater program is to prevent these *upland* contributions from having too detrimental an effect on the ambient waters. But although it is indisputably true that matter washed in from uplands affect traditionally navigable waters, and that one could describe this effect as a "significant nexus" between uplands and waters, it would be foolish to say that because there is a significant nexus, all uplands must be classified as waters of the United States.

Thank you for the opportunity to comment on the Proposed Rule. I hope the foregoing thoughts are helpful.

Sincerely yours,

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