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COMMENTS

of

**THE WASHINGTON LEGAL FOUNDATION**

to the

**ENVIRONMENTAL PROTECTION AGENCY**

and the

**U.S. ARMY CORPS OF ENGINEERS**

Concerning

**DEFINITION OF “WATERS OF THE UNITED STATES”  
UNDER THE CLEAN WATER ACT  
(Docket ID No. EPA-HQ-OW-2011-0880)**

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August 22, 2014

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EPA Docket Center  
Attention: Docket ID No. EPA-HQ-OW-2011-0880  
EPA West Room 3334  
1301 Constitutional Ave. NW,  
Washington, D.C. 20004

**Re: Comments Concerning the Proposed Definition of “Waters of the United States” Under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880)**

Dear Sir/Madam:

Pursuant to the public notice published at 79 Fed. Reg. 35712 (June 16, 2014), the Washington Legal Foundation (WLF) appreciates this opportunity to offer comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the “Corps”) on the agencies’ proposed Rule defining the scope of federal jurisdiction under the Clean Water Act (CWA) in light of recent Supreme Court rulings.

WLF is concerned that the proposed Rule’s reliance on Justice Kennedy’s “significant nexus test” to promulgate new definitions for “tributary,” “adjacent,” and “other waters” will undoubtedly lead to the sort of resource-intensive and inconsistent case-by-case analysis explicitly rejected by a strong majority of the Supreme Court in *Rapanos*. In all events, such a rule exceeds the powers granted to the agencies under the CWA.

**I. Interests of WLF**

Founded in 1977, the Washington Legal Foundation is a public-interest law firm and policy center based in Washington, D.C. with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF engages in original and *amicus* litigation in a wide variety of environmental matters, including cases involving the proper scope of the federal government’s Commerce Clause powers. In particular, WLF has participated as *amicus curiae* in several cases that raise constitutional issues under the CWA that are similar to

those at issue in the proposed Rule. *See, e.g., Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“SWANCC”).

In addition, WLF’s Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to EPA regulation under the CWA. *See, e.g.,* George J. Mannina, Jr., *EPA Seeks to Overturn Supreme Court Decisions Limiting Water Act Jurisdiction*, WLF LEGAL BACKGROUNDER (May 20, 2011); Joshua A. Bloom, *New Rule Expands Oversight of Wetlands*, WLF COUNSEL’S ADVISORY (March 9, 2001); James M. Thunder, *Courts and Regulators Shape New Application of Clean Water Act*, WLF LEGAL BACKGROUNDER (October 29, 1999).

WLF is concerned that the agencies’ proposed definition of “waters of the United States” is not consistent with the leading Supreme Court cases interpreting the permissible outer limits of federal jurisdiction under the CWA. The purported goals of EPA’s proposal are to provide clarity and predictability to the public, with a rule that is clear, understandable, and consistent with the law. A careful reading of the proposed Rule, however, suggests that its practical effect will likely be to accomplish something Congress chose not to do—effectively circumvent the Supreme Court’s imposition of meaningful limits on how far the Corps and EPA can go in asserting jurisdiction under the CWA.

## **II. The Proposed Rule**

At its core, the proposed Rule would presumptively determine that certain waters are subject to regulation under the CWA, based in part upon a controversial draft EPA report that considers studies of the connectivity of streams and wetlands to downstream waters. If finalized, the proposed Rule will have expansive consequences for all developers and users of land across the United States, as the proposal will set the table for determining which wetlands, ponds, and other waters would fall within the jurisdictional reach of the CWA—and, in turn—would be subject to the permitting and enforcement authorities of EPA and the Corps.

*Defined Categories of “Waters of the United States.”* In the proposed Rule, the agencies propose to define the following categories to be “waters of the United States”:

- Traditional navigable waters. These are tidal waters or waters that are, have been or could be used to transport interstate or foreign commerce.

- Interstate waters. These are waters that cross state lines.
- The territorial seas. These are a belt of waters surrounding the United States shoreline.
- Tributaries of traditional navigable waters, interstate waters, or the territorial seas. The proposal includes all natural and man-made tributaries adjacent to or near those waters.
- All waters, including wetlands, that are adjacent to traditional navigable waters, interstate water, the territorial seas, impoundments, or tributaries.
- Impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters.

Although these categories largely track the framework used in earlier guidance, the proposal has new and expanded definitions of key terms which could result in expanded federal jurisdiction. “Tributaries,” for example, are newly defined to include any land with a bed and bank and an ordinary high water mark that contributes flow to any waterway, meaning land that is dry for much of the year could be covered. Likewise “adjacent” waters are defined as “bordering, contiguous or neighboring” waters, where a “neighboring” water includes a nearby floodplain or “riparian” area—an area expansively defined as where surface or groundwater “directly influence the ecological processes and plant and animal community structure in that area.” The waters that meet these new definitions would be jurisdictional waters of the United States under the proposed Rule—no additional analysis of the nexus of such waters to downstream waters would be required.

***“Significant Nexus” Test for Addressing “Other Waters.”*** For any “other waters” that do not fall under the listed categories, the agencies propose a process under which those waters could be found to be “waters of the United States.” The test would be whether the water has a “significant nexus” to jurisdictional waters under Justice Kennedy’s concurrence in *Rapanos*. Under the proposal, on a case-by-case basis, the agencies could determine whether the aggregate effect of geographically isolated wetlands and other waters significantly affect the physical, biological, and chemical integrity of federally protected downstream waters. WLF fears that this process could greatly expand federal jurisdiction on a case-by-case basis in a way that injects great uncertainty into the process and makes it very hard to predict what “other” waters are regulated.

***Categorical Exclusions.*** The proposal does expressly exclude “ditches”—but only if the ditches are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and the ditches do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a

jurisdictional water. Other artificial waters would likewise be excluded, such as irrigated areas that would revert to uplands and artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for certain listed purposes. Water-filled depressions created incidental to construction activity, as well as gullies, rills, and non-wetland swales, would also be excluded.

### **III. The SWANCC Decision**

Thirteen years after Congress passed the CWA, the Corps determined that the law applied to waters that “are or could be used” by migratory birds. A 1994 General Accounting Office report concluded that the effect of this Migratory Bird Rule (“MBR”) was “that nearly all waters and wetlands” in the U.S. were jurisdictional. When 23 Illinois municipalities banded together as the Solid Waste Agency of Northern Cook County (“SWANCC”) to build a municipal landfill in an abandoned, strip-mined gravel pit, the Corps applied the MBR to assert CWA jurisdiction. *SWANCC*, 531 U.S. at 162-63. Although the Corps initially concluded that it had no jurisdiction over the site because it contained no “wetlands,” it later found that when rainwater accumulated in the strip-mined trenches they became navigable waters of the U.S. subject to CWA jurisdiction because migratory birds could ostensibly use the water. *Id.* at 164. The Corps assumed the birds could use the waters because migratory birds had been seen on the site. *Id.* at 166. The Corps’ jurisdictional claim meant SWANCC was required to get a § 404 CWA permit to fill the trenches at the proposed project site.

SWANCC unsuccessfully applied for the § 404 permit, expending several million dollars in the process. After the Corps denied the permit request, SWANCC brought suit challenging whether the Corps or EPA had jurisdiction over the site under the CWA. *Id.* at 165. Ultimately, the Supreme Court ruled that because the Migratory Bird Rule exceeded the authority the CWA granted the Corps and EPA, SWANCC did not require a CWA permit to build its landfill. Acknowledging that “significant constitutional questions” were implicated by the Corps’ and EPA’s efforts to expand the CWA’s jurisdictional reach, the Court concluded that “[p]ermitting [the Corps] to claim federal jurisdiction . . . would result in a significant impingement of the State’s traditional and primary power over land and water use.” *Id.* at 174. The Court found that there was simply “no persuasive evidence” that Congress ever acquiesced to “the Corps’ claim of jurisdiction over non-navigable, isolated, intrastate waters.” *Id.* at 171. Accordingly, the Court “decline[d] respondents’ invitation to . . . hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(2a)’s definition of ‘navigable waters’ because they serve as a habitat for migratory birds.” *Id.* at 171-72.

SWANCC thus makes clear that isolated ponds are not subject to the CWA and outside of the federal agencies' jurisdiction.

For the SWANCC majority, any attempt to extend the “waters of the United States” beyond “navigable waters” “raised significant constitutional questions.” *Id.* at 177. In such a situation the Court “read[s] the statute as written to avoid the significant constitutional and federalism questions . . . and therefore reject[s] . . . administrative deference.” *Id.* “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.* (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)). Consequently, the definition of “waters of the United States” that the Corps argued “falls within Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce” was unacceptable without an articulation of “the precise object or activity that, in the aggregate, substantially affects interstate commerce.” *Id.*

The Court found “no persuasive evidence that the Corps mistook Congress’ intent in 1974” by tying jurisdiction to a body of water’s “capability of use by the public for purposes of transportation or commerce which is the determinative factor.” *Id.* at 168. Indeed, the congressional history revealed no intention “[b]eyond Congress’ desire to regulate wetlands adjacent to ‘navigable waters.’” *Id.* at 170-171. Before striking down the agency’s interpretation of the CWA, the Court remarked that “[t]wice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.” *Id.* at 173 (citing *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995)). SWANCC was the last ruling on CWA jurisdiction in which the Supreme Court provided a clear, majority opinion.

#### **IV. The *Rapanos* Decision**

Five years after the SWANCC decision, the Supreme Court was called upon once again to decide which waters are subject to CWA jurisdiction. *Rapanos v. United States* involved four Michigan wetlands located near man-made ditches that eventually emptied into traditional navigable waters. 547 U.S. at 762-63. The United States brought civil enforcement proceedings against the *Rapanos* petitioners, who had backfilled three of the areas without a permit. *Id.* The district court found federal jurisdiction over the wetlands because they were adjacent to “waters of the United States” and held petitioners liable for CWA violations. *Id.* Affirming, the Sixth Circuit found federal jurisdiction based on the

sites' hydrologic connections to the nearby ditches or drains, or to more remote navigable waters. *Id.* The Supreme Court granted review.

Leaving the *SWANCC* decision intact (all nine justices agreed with the holding in *SWANCC*), the *Rapanos* Court fractured, with four justices—led by Justice Scalia—voting for a narrow interpretation of CWA jurisdiction; four dissenting justices—led by Justice Stevens—voting for an expansive view; and Justice Kennedy in the middle casting the deciding vote. Every justice agreed that traditional navigable waters (*i.e.*, waters that are navigable in fact and waters that could be made navigable) are jurisdictional. As to tributaries that cannot be made navigable and intermittent streams, the four dissenting Justices would have deferred to the Corps' assertion of jurisdiction. *Id.* at 787-810.

Justice Scalia's plurality adopted a jurisdictional test under which "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'" connected to navigable-in-fact waters are subject to CWA jurisdiction. *Id.* at 739. Although these bodies of water can be purely intrastate, they do "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* Likewise, "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and are covered by the [CWA]." *Id.* at 742. Such wetlands must be "as a practical matter indistinguishable" from the relatively permanent body of water, and that body of water must itself be "connected to traditional interstate navigable waters." *Id.* at 742, 755.

Justice Kennedy, writing for himself, concluded that regulating such non-navigable tributaries went too far because it gave CWA jurisdiction over "every ditch or drain, however remote and insubstantial, that may eventually flow into traditional navigable waters." *Id.* 778. Justice Kennedy condemned the practice by which the Corps simply "deems a water a [regulated] tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high water mark." *Id.* at 781. This point echoed the Court's opinion in *SWANCC* that the Corps' view of its CWA jurisdiction had no discernable limits. As to wetlands adjacent to waters that are navigable in fact, Justice Kennedy viewed these wetlands as subject to the CWA based on "a reasonable inference of biological interconnection . . ." *Id.* at 782. For wetlands adjacent to non-navigable tributaries, Justice Kennedy proposed a test under which "the Corps must establish a significant nexus on a case-by-case basis." *Id.*

## V. The Supreme Court Has Never Embraced the Proposed Rule's "Significant Nexus Test"

EPA and the Corps are wrong to read the robust holding in *SWANCC* as being limited solely to the Migratory Bird Rule.<sup>1</sup> Equally mistaken is their apparent take-away that the case somehow created a "significant nexus" test.<sup>2</sup> *SWANCC* clearly established a firm check on the agencies' view of federal jurisdiction, which the Court found was "a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. There, as here, EPA "attempt[ed] to 'clarify' the reach of its jurisdiction" through a new definition of "waters of the United States." *Id.* at 164. The Court struck down that "clarification," noting that EPA "fac[ed] a difficult task in overcoming the plain text and import of § 404(a)" because "[a]bsent overwhelming evidence of [congressional] acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 682, n.5. Rather, the Court "expect[s] a clear indication that Congress intended" for the "administrative interpretation [to] invoke[] the outer limit of Congress' power." *Id.* at 683. Such a "concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.*

As for the powers granted to regulatory agencies by the CWA, the *SWANCC* Court noted that "[r]ather than expressing a desire to readjust the federal-state balance [by reading out the term 'navigable'], 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. . . .'" *Id.* at 684 (quoting 33 U.S.C. § 1251(b)). Searching the legislative history, the Court found nothing that "signifie[d] that Congress intended to exert anything more than its commerce power of navigation" and "[t]he committee . . . d[id] not redefine navigable waters." *Id.* at 683 n.3, n.6. By using the "term 'navigable' . . . 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 so made." *Id.*

Without explanation, the agencies' proposed Rule seeks to adopt Justice Kennedy's "significant nexus" test from *Rapanos*. But that approach to interpreting a Supreme Court plurality decision is plainly mistaken. In *Marks v. United States*, the Court announced a rule for interpreting its split decisions, stating that "[w]hen a

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<sup>1</sup> 79 Fed. Reg. 22252

<sup>2</sup> *Id.*

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 judgment *on the narrowest grounds.*” 430 U.S. 188, 193 (1976) (emphasis added). “Narrowest grounds” has been interpreted by the D.C. Circuit to mean that opinion which is a “logical subset of other, broader opinions.” *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). The ultimate goal is to find “a single legal standard . . . [that] when properly applied, produce[s] results with which a majority of the Justices in the case articulating the standard would agree.” *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir.1991), *modified on other grounds*, 505 U.S. 833 (1992).

Applying the *Marks* rule to *Rapanos*, the Scalia plurality concurred with the judgment on the narrowest grounds. As a logical subset of the much broader Kennedy test, the Scalia plurality is the controlling position under *Marks*. Any body of water that satisfies the Scalia plurality’s test would also satisfy Justice Kennedy’s “significant nexus” test. At least eight of the nine Justices would agree that any waters that satisfy Justice Scalia’s test are jurisdictional. Conversely, eight of the nine Justices *expressly rejected* Justice Kennedy’s significant nexus test. Scalia’s four-member plurality made it clear that “Justice Kennedy [simply] devised his new statute all on his own,” *Rapanos* 547 U.S. at 756, and that the Court’s previous rulings had “explicitly rejected such case-by-case determinations.” *Id.* at 753. Likewise, *SWANCC* “*specifically rejected* the argument that physically unconnected ponds could be included based on the ecological connection to covered waters.” *Id.* at 754 (emphasis in original). Further, the “phrase appears nowhere in the Act” and can only be inserted “by ignoring the text of the statute.” *Id.* at 755. The plurality concluded “[i]t would have been an easy matter for Congress to give the Corps jurisdiction over all [waters] that ‘significantly affect the chemical, physical, and biological integrity of’ waters of the United States. It did not do that, but instead explicitly limited jurisdiction to ‘waters of the United States.’” *Id.* at 756.

Even the *Rapanos* dissenters agreed on this point. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, did “not share [Kennedy’s] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term ‘significant nexus’ as used in *SWANCC*.” *Id.* at 808 (Stevens, J., dissenting). Indeed, Stevens noted that “*SWANCC*’s only use of the term comes in [one] sentence.” *Id.* “Justice Kennedy’s approach will have the effect of creating additional work for all concerned” with “no certain way of knowing whether they need” permits and the “Corps will have to make case-by-case” determinations. *Id.* at 809. “These problems are precisely the ones that *Riverside Bayview* . . . avoided.” *Id.*

Justice Stevens concluded that he “see[s] no reason to” adopt the significant nexus test. *Id.*

Nevertheless, the Rule proposed by the agencies inexplicably relies on Justice Kennedy’s “significant nexus” test to justify their new definitions:

Because Justice Kennedy identified “significant nexus” as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the “significant nexus” standard for CWA jurisdiction that Justice Kennedy’s opinion applied to adjacent wetlands to other categories of water bodies as well (such as to tributaries of traditional navigable waters or interstate waters, and to “other waters”) to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.<sup>3</sup>

Not only does this approach rely on the broadest concurring opinion in *Rapanos*, which the *Marks* rule dictates is *not* the Court’s holding, but it also would impose a rule that eight of the nine *Rapanos* Justices *expressly rejected*. Notably, the agencies never explain *why* they chose to single out Kennedy’s “significant nexus” test as the basis for their new definitions. Regardless, the significant nexus test has no proper place in the Agencies’ interpretation of “waters of the United States” under the CWA. It can find no support in either the statute or Supreme Court precedent. The Agencies’ reliance on Kennedy’s idiosyncratic interpretation to completely rewrite the jurisdictional reach of the CWA will not withstand judicial scrutiny.

## VI. Conclusion

The CWA does not grant the agencies the authority to regulate every drop of water in the nation. Rather, the statute applies only to discharges into “navigable waters.” 33 U.S.C. § 1344(a). While the Supreme Court has recognized a narrow exception to the plain meaning of “navigable waters”—namely, that wetlands sharing a bank with navigable waters are themselves considered “navigable”—the scope of the proposed Rule’s definition—under which wetlands miles away from navigable-in-fact waters could be considered “navigable”—runs contrary to the plain text of the statute and the intent of Congress. If the agencies were to embrace the construction of the CWA as advanced by the proposed Rule, the statute as so construed would exceed Congress’s power under the Commerce Clause. The Washington Legal Foundation respectfully requests that the Corps and EPA withdraw the proposed Rule clarifying the definition of

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<sup>3</sup> 79 Fed Reg. 22192.

“waters of the United States” in order to comply with Supreme Court precedent that is directly on point.

Respectfully submitted,

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