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EPA and the Corps' Definition of "Waters of the United States" Under the Clean Water Act May 27, 2015 Final Rule

Current as of December 17, 2015

I. In the Beginning Cuyahoga River 1952

A. Clean Water Act regulates "navigable waters," defined in the statute as "waters of the United States" (33 USC §§ 1344(a), 1362,(7), 1362(12)

B. Definition covers all sections of the Act (including NPDES 402 and Dredge and Fill 404 programs)

C. EPA and the Corps also have promulgated from time to time regulations that define "waters of the United States" (33 CFR § 328.3(Corps); 40 CFR § 232(q) (EPA)

II. Prior Corps Regulatory Definitions of Waters of the U.S.

A. 1974: "Navigable waters" means "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." (33 CFR § 1362(7))

B. 1977: "Navigable waters" includes "isolated wetlands and lakes, intermittent streams, prairie potholes and other waters that are not part of a tributary system to interstate waters or navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." (33 CFR § 323.2(a)(5))

C. "Wetlands" means "[t]hose areas that are inundated or saturated with surface or groundwater at a frequency and duration sufficient to support, and that under normal

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." (33 CFR § 323.2(c))

D. 1986: "Waters of the U.S." include intrastate waters used by migratory birds, and waters which are used to irrigate crops in interstate commerce. (33 CFR § 323.2(a)(5))

III. Regulations History and Currently in Effect

A. Mid-1980s: EPA and Army Corps (40 CFR § 232.2(q); 33 CFR § 328.3)

- "Waters of the United States" include:
  - Waters susceptible for use in interstate or foreign commerce
  - Interstate waters
  - All "other waters," the use, degradation or destruction of which could affect interstate or foreign commerce
  - Impoundments of waters otherwise within federal jurisdiction
  - Tributaries of jurisdictional waters
  - Territorial seas
  - Wetlands adjacent to jurisdictional waters
- "Waters of the United States" do <u>not</u> include:
  - Waste treatment systems
  - Prior converted croplands

B. 1986, 1988: EPA and Army Corps provide in regulatory preambles that the following are <u>not</u> "waters of the United States" (53 Fed. Reg. 20765 (June 6, 1988); 51 Fed. Reg. 41217 (Nov. 13, 1986))

- "Non-tidal drainage and irrigation ditches excavated on dry land"
- "Artificial lakes or ponds created by excavating

and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing"

- "Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land…"
- "Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States"

IV. *SWANCC*

A. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001):

- "Migratory Bird Rule" invalid
- Text of CWA does not allow holding that Corps' jurisdiction "extends to ponds that are *not* adjacent to open water."

B. Explaining *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985):

- "Corps had 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway", *SWANCC*, 531 U.S. at 167.
- "Significant nexus" between wetlands and navigable waters.
- No opinion expressed on regulation of "discharge of fill materials into wetlands that are not adjacent to bodies of open water."

V. *Rapanos* and *Carabell*

A. *Rapanos v. United States* and *Carabell v. United States*, 547

U.S. 715 (2006)

- Wetlands adjacent to non-navigable tributaries of navigable water are regulated
- Kennedy "significant nexus" test
- 4-1-4 split decision

B. All Justices agree CWA protects more than traditionally navigable waters.

C. Two tests for protection of waters at issue:

- Scalia Plurality test: (Scalia, Alito, Thomas, Roberts)

1. CWA protects "relatively permanent waters;" and
2. Wetlands with a "continuous surface connection" to relatively permanent waters or traditionally navigable waters.
3. In a footnote, plurality says it does not mean to exclude "seasonal" water from protections.

- Kennedy: "Significant nexus" test for some adjacent wetlands.

D. Dissent (Stevens, Ginsburg, Souter, Breyer): Would regulate all tributaries and adjacent wetlands.

E. Kennedy "Significant Nexus" Test from *Rapanos*:

- "[W]etlands 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."

VI. EPA and the Corps Post-*SWANCC* and *Rapanos*

A. Post-*SWANCC*:

- EPA and the Corps had issued an "Advanced Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of "Waters of the United States" 68 Fed. Reg. 1991 (Jan. 15, 2003) attaching a "Joint Memorandum" providing guidance on *SWANCC*

B. Post-Rapanos:

- EPA and Corps memorandum "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. U.S.* & *Carabell v. U.S.*," December 2, 2008

C. April 2011 EPA Guidance Letter on Waters of the United States

- Intended to clarify how EPA and the Corps would identify protected waters after the *SWANCC* and *Rapanos* decisions
- Intended to supercede the 2003 and 2008 EPA/Corps memoranda
- Significantly broadened EPA jurisdiction
- After comment from virtually every sector that a rulemaking was required, the 2011 guidance was withdrawn from interagency review in September 2013 and the 2014 Proposed Rule was developed; the 2008 guidance remains in effect

VII. The April 14, 2014 Proposed Rule

A. On April 14, 2014, EPA and Corps published a proposed rule to redefine the "waters of the United States" ("WOTUS") subject to regulation under the Clean Water Act (79 Fed. Reg. 22188-22274 (April 21, 2014))

- Discharges to WOTUS require CWA permits
- WOTUS must meet Water Quality Standards
- Citizens may sue to enforce the CWA

B. The definition:

- Traditional navigable waters
- Interstate waters
- Territorial seas
- Impoundments of 1-3, 5
- All tributaries of 1-4
- "Waters" (including wetlands) adjacent to 1-5
- Other waters that have a significant nexus to 1-3

C. Affected All CWA Programs

- The proposed rule replaced the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, in particular sections 311, 401, 402, and 404:
  - 33 C.F.R. § 328.3: Section 404
  - 40 C.F.R. § 110.1: Oil Discharge Rule
  - 40 C.F.R. § 112.2: Spill Prevention, Control and Countermeasure Plan
  - 40 C.F.R. § 116.3: Designation of hazardous substances
  - 40 C.F.R. § 117.1(i): Notification of discharge of hazardous substances required
  - 40 C.F.R. § 122.2: NPDES permitting and Storm Water
  - 40 C.F.R. § 230.3(s) and (t): Section 404
  - 40 C.F.R. § 232.2: Section 404 exemptions
  - 40 C.F.R. § 300.5: National Contingency Plan for oil discharges

- 40 C.F.R. § 300, Appendix E to Part 300, 1.5: Structure of plans to respond to oil discharges
- 40 C.F.R. § 302.3: Petroleum exclusion
- 40 C.F.R. § 401.11: Effluent limitations

VIII. CWA §404(f)(1)(A)

- Exclusion of "normal farming and ranching activities"
- The "interpretative rule" was withdrawn effective January 29, 2015 (EPA and DOD Notice of Withdrawal, 80 Fed. Reg. 6705 (Feb. 6, 2015))

IX. The May 27, 2015 Final rule

A. On May 27, 2015, EPA and Corps issued a final rule to redefine the "waters of the United States" ("WOTUS") subject to regulation under the Clean Water Act

B. The Rule became effective August 28, 2015.

C. The Sixth Circuit stayed effectiveness of the rule nationwide on October 9, 2015

D. The Clean Water Rule Definition

- Traditional navigable waters (TNW)
- Interstate waters
- Territorial seas
- Impoundments of otherwise jurisdictional waters
- Tributaries (newly defined)
- Adjacent Waters (newly defined)
- Enumerated regional features with a "significant nexus" to 1-3 waters
- Geographic: Waters in the 100-year flood plain of 1-3 waters, or within 4,000 feet of the high tide line

or ordinary high water mark of 1-5 waters if there is a significant nexus

E. Jurisdictional Waters:

- Discharge Prohibition (§ 301)
- Standards/TMDL (§ 303)
- NPDES Permits (§ 402)
- Dredge & Fill Permits (§ 404)
- Certifications (§ 401)

F. Excluded Waters – Not Jurisdictional

- Waste Treatment Systems
- Prior Converted Cropland
- Some Ditches
  - Ephemeral and intermediate flow AND not relocated tributary
- Ditches that do not flow to 1-3
- Certain Features
  - Pools
  - Puddles
- Groundwater
- Certain Stormwater Control Features created in dry land
- Certain wastewater recycling and groundwater recharge facilities

G. Tributaries: New Definitions

- Definition relies on bed, banks, OHWM which can be seen even in features without ordinary flow
- Agencies can assert jurisdiction over perennial, intermittent, and ephemeral streams

- Allows assertion of jurisdiction over ephemeral drainages that flow for only a few hours or days following a rain event
- Areas where there are historical indicators of prior existence of bed, bank, or OHWM even where these are not now present (for example, stream gauge data, elevation data, historical records)
- Areas that met tributary definition at one time
- Waters are tributaries regardless of manmade or natural breaks of any length

H. Ditches

- Exempt Ditches
  - Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
  - Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
  - Ditches that do not flow, directly or through another water, into a 1-3 water
- Ditches That Would be Jurisdictional
  - Ditches, including roadside ditches, that have perennial flow
  - Ditches that have intermittent flow and are a relocated tributary, excavated in a relocated tributary, or drain wetlands
  - Ditches that have ephemeral flow and are a relocated tributary or excavated in a tributary
- Applicants will be required to prove that their ditches do not excavate or relocate a tributary, using topographical maps, historic photos, and the

like

I. Adjacent Waters: New Definitions

- The final rule defines the "adjacent waters" category with a definition of "neighboring", which means:
  - All waters located within 100 feet of the OHWM of a 1-5 water;
  - All waters located within the 100-year floodplain of a 1-5 water and not more than 1,500 feet from the OHWM of such water; and
  - All waters located within 1,500 feet of the high tide line of a 1-3 water.
- The entire water is adjacent if any part of the water is bordering, contiguous, or neighboring.
  - If a portion of a water is located within 1500 feet of OHWM and within the 100-year floodplain, the entire water is jurisdictional.
  - This is true even if there are berms, roads, or other barriers between the 1-5 water and the feature at issue. Man-made levees and similar structures do not isolate adjacent waters.
- Waters outside the scope of these "neighboring" distance thresholds can still be jurisdictional through a case-by-case significant nexus analysis.
- The "adjacent" definition provides that waters being used for "established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent." However, the preamble notes that waters in which normal farming, ranching, and silviculture activities occur may still

be determined to have a significant nexus on a case-specific basis under sections (a)(7) and (a)(8).

J. Case Specific/Significant Nexus WOTUS

- Under (a)(7), 5 subcategories of waters (prairie potholes, Carolina bays, Delmarva bays, Pocosins, Western vernal pools, and Texas coastal prairies wetlands) are jurisdictional where they are determined, on a case-specific basis to have a significant nexus to a 1-3 water.
- Under (a)(8), all waters located within the 100-year floodplain of a 1-3 water and all waters located within 4,000 feet of the high tide line or OHWM of a 1-3 water are jurisdictional.
- If any portion of the water is within the 100-year floodplain or within 4,000 feet of the high tide line or OHWM, and the water is determined to have a significant nexus, the entire water is a water of the U.S.
- Significant nexus "means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of the water identified in paragraphs (a)(1)-(3) of this section."
    - The term "in the region" means the watershed that drains to the nearest 1-3 water
    - For an effect to be significant, it must be "more than speculative or insubstantial."
    - Waters are similarly situated when they "function alike and are sufficiently close to function together in affecting downstream waters."

- The effect on downstream waters will be assessed by evaluating functions identified in the regulation

K. Exclusions

- The final rule excludes:
  - Waste treatment systems, including ponds or lagoons designed to meet the requirements of the CWA;
  - Prior converted cropland;
  - Certain ditches: (i) ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary; (ii) ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands; (iii) ditches that do not flow, either directly or through another water, into an (a)(1) through (3) water;
  - Artificially irrigated areas that would revert to dry land if application of water ceases;
  - Artificial, constructed lakes and ponds created in dry land (e.g., farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds);
  - Artificial reflecting pools or swimming pools created in dry land;
  - Small ornamental waters created in dry land;
  - Water filled depressions created in dry land incidental to mining or

construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetlands swales, and lawfully constructed grassed waterways;
- Puddles;
- Groundwater, including groundwater drained through subsurface drainage systems;
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and
- Wastewater recycling structures constructed in dryland; detention and retention basins built for wastewater recycling; and water distributary structures built for wastewater recycling.

- Waters that meet the exclusions are not "waters of the U.S.," even if they otherwise fall within one of the categories in (a)(4) through (8) of the rule.

L. "Dry Land" Requirement

- The agencies declined to provide a definition of "dry land" in the regulation because they "determined that there was no agreed upon definition given geographic and regional variability." The preamble states that "dry land" "refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like." Final Rule at 173.

- Many features will not qualify for exclusion because they were not created in dry land.

X. Judicial Review

- The preamble asserts the Agencies' position that, pursuant to CWA § 509, challenge to the final rule must occur in the Circuit Courts of Appeals. Final Rule at 195.
- Threshold Question: Review of Final Rule in district courts under the APA (28 USC 1331) or original jurisdiction on petition for review in courts of appeals (33 USC 1369(b)(1))?
- EPA – Documents Related to the Proposed Definition of "Waters of the United States" Under the Clean Water Act

  http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF DEFENSE, FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 PUBLISHED ON JUNE 29, 2015 (MCP NO. 135).	Docket No. 15-3751 and related cases: 15-3799, 15-3817, 15-3820, 15-3822, 15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853, 15-3858, 15-3885, 15-3887

MOTION BY STATES OF NEW YORK, CONNECTICUT, HAWAII, MASSACHUSETTS, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, TO INTERVENE IN SUPPORT OF RESPONDENTS IN DOCKET NO. 15-3751 AND IN EACH OF THE RELATED CASES

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PRELIMINARY STATEMENT

Under Rule 15(d) of the Federal Rules of Appellate Procedure, the states of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington, and the District of Columbia (collectively, Proposed Intervenor States or States), hereby move for leave to intervene in support of respondents United States Environmental Protection Agency (EPA), the United State Army Corps of Engineers (Army Corps), and their officers in Docket No. 15-3751 and in each of the related petitions: Docket Nos. 15-3799, 15-3817, 15-3820, 15-3822, 15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853, 15-3858, 15-3885, and 15-3887.

In these 14 petitions, petitioners challenge the promulgation of the Clean Water Rule by EPA and the Army Corps. *See* 80 Fed. Reg. 37054 (June 29, 2015). The Rule defines the term "waters of the United States" as used in the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, thereby establishing the scope of protection under the Act.

Proposed Intervenor States support the Clean Water Rule because it protects their water quality, assists them in administering water pollution programs by dispelling confusion about the Act's reach, and

prevents harm to their economies by ensuring adequate regulation of waters in upstream states. The States respectfully request that the Court grant this motion based on their strong direct and substantial interests in the outcome of the petitions.[1]

Counsel for movants contacted counsel for all petitioners and respondents in the petitions concerning their position on this motion. Respondents EPA and Army Corps have stated that they do not oppose the motion, as have the petitioners in the following 12 petitions: Docket Nos. 15-3751, 15-3799, 15-3817, 15-3820, 15-3822, 15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853, and 15-3858. Counsel for petitioners in Docket No. 15-3887 stated that they do not object to the States' intervention provided that it does not delay the briefing schedule. Counsel for petitioners in Docket No. 15-3885 stated that they take no position on the States' intervention but reserve the right to oppose following their review of this motion.

[1] The District of Columbia supports the rule overall because of the environmental benefits it will provide in improving water quality, but it maintains its concerns that were articulated in comments provided to EPA on November 17, 2014 by the Department of Energy & Environment (formerly known as the District Department of the Environment).

A. The Clean Water Act and "Waters of the United States"

In 1972, Congress determined that America's waters were "severely polluted" and "in serious trouble,"[2] and that "the federal water pollution control program . . . has been inadequate in every vital respect." *Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981). In "dramatic response to accelerating environmental degradation of rivers, lakes, and streams in this country," *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977), Congress enacted amendments to the Federal Water Pollution Control Act, known commonly as the "Clean Water Act," 33 U.S.C. § 1251 *et seq.*, with the sole "objective . . . 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' In order to achieve that objective, Congress declared that 'it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.'" *Costle v. Pac. Legal Found.*, 445 U.S. 198, 202 (1980) (internal citations omitted).

[2] S. Rep. No. 92-414, (1972), reprinted in 1 Environmental Policy Division, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1425 (U.S. G.P.O. 1973); H. Rep. No 92-911, at 66 (1972), *reprinted in* I 1972 Leg. Hist., at 753.

The Act represents "a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992). The Act establishes minimum pollution controls that are applicable nationwide, and states may not adopt or enforce controls that are less stringent than those promulgated under the Act. *See* 33 U.S.C. § 1370(1). The Act's nationwide pollution controls protect downstream states from pollution originating outside their borders. They serve to prevent the 'Tragedy of the Commons' that might result if jurisdictions could compete for industry and development by allowing more water pollution than their neighboring states. *NRDC*, 568 F.2d at 1378 (citing *NRDC v. Train*, 510 F.2d 692, 709 (D.C. Cir. 1975)).

The Act's regulatory scope applies to "navigable waters," defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). But the Act does not define "waters of the United States," despite the importance of that term.

The absence of a clear and appropriate definition of "waters of the United States" can undermine the Act's objective of restoring and maintaining the health of the Nation's waters. Without such a definition, the scope of many programs central to the Act may be

difficult to determine and waters may go unprotected. For example, the Act protects wetlands from destruction, and enhances downstream water quality, by prohibiting discharges of dredge or fill material unless authorized by the Army Corps in a Section 404 permit or by a state that chooses to administer the Section 404 program. 33 U.S.C. §§ 1311(a), 1344. As noted by Justice Kennedy in his concurrence in *Rapanos v. Army Corps*, the filling of wetlands

> may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered [by the wetlands] but also the act of filling and draining may itself cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands.

547 U.S. 715, 775 (2006). But this program applies only to discharges into the "waters of the United States."

Similarly, the Act broadly prohibits pollutant discharges unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit generally issued by the states and in some cases by EPA. 33 U.S.C. §§ 1311(a), 1342. In fact, the NPDES program is "the primary means" for achieving the Act's ambitious water quality objectives, and serves as "a critical part of Congress' 'complete

rewriting' of federal water pollution law." *Arkansas*, 503 U.S. at 101-02 (quoting *Milwaukee*, 451 U.S. at 317). But the Act's pollution prohibition and NPDES program apply only to discharges into the "waters of the United States."

In addition, the Act requires states to set water quality standards for waters within their borders and empowers states to issue or withhold "water quality certifications" needed for applicants for federal licenses or permits to conduct activities that may result in discharges into those waters. 33 U.S.C. § 1341. But states can only protect their waters by performing these functions when the involved waters are deemed "waters of the United States."

Since the Act's creation, the Army Corps and EPA have interpreted "waters of the United States" pursuant to agency practice and regulation. At times the federal agencies' interpretation has been upheld by the courts, while at other times it has not. *Compare United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *with Solid Waste Agency of N. Cook County v. Army Corps*, 531 U.S. 159 (2001) *and Rapanos*, 547 U.S. at 739 (plurality opinion).

In *Rapanos*, all members of the Court agreed that the Act's jurisdiction extends beyond "traditional navigable waters," also known as "navigable in fact" waters, *i.e.*, waters capable of navigation. But as to non-traditional navigable waters, no single interpretation of "waters of the United States" commanded a majority of the Supreme Court. In *Rapanos*, the plurality interpreted "waters of the United States" to include: (1) relatively permanent, standing or continuously flowing bodies of water that are connected to traditional navigable waters, and (2) wetlands with a continuous surface connection to relatively permanent waters. *Rapanos*, 547 U.S at 739, 742. The plurality opinion also stated that waters that might dry up in a drought, or seasonal rivers which have continuous flow during some months of the year, are not necessarily excluded from the Act's jurisdiction. *Id*. at 732 n.5.

In contrast, Justice Kennedy's concurrence in the judgment, which was needed to secure a majority, endorsed a "significant nexus test" in which wetlands (and presumably other waters such as tributaries) would qualify as "waters of the United States" if they "possess a significant nexus to waters that are or were navigable in fact or that

could reasonably be so made." *Rapanos*, 547 U.S at 759 (internal quotations omitted). According to Justice Kennedy, wetlands have the requisite significant nexus if "either alone or in combination with similarly situated [wet]lands in the region, [they] significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

In the wake of *Rapanos*, a complex and confusing split developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain jurisdiction, with some courts adopting Justice Kennedy's significant-nexus test (*see, e.g.*, *United States v. Gerke Excavating Inc.*, 464 F.3d 723 (7th Cir. 2006)), some holding that waters are within the Act's jurisdiction if *either* the plurality or significant-nexus test is satisfied (*see, e.g., United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011)), and some tending to defer to the agencies' fact-based determinations (*see, e.g., Precon Dev. Corp. v. Army Corps*, 633 F.3d 278 (4th Cir. 2011)).

B. Promulgation of the Clean Water Rule

In April 2014, EPA and the Army Corps published a proposed rule to define "waters of the United States," and made the rule available for an extended public comment period. 79 Fed. Reg. 22188 (Apr. 21, 2014). After receiving over one million comments, most of which supported the rule, the agencies published the final rule on June 29, 2015. *See* 80 Fed. Reg. 37054.

The rule clarifies the scope of "waters of the United States" that are protected under the Act, and reduces the agencies' reliance on time-consuming, inefficient, and potentially inconsistent case-by-case jurisdictional determinations. In issuing the rule, EPA and the Army Corps relied on "the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute." 80 Fed. Reg. at 37055. The agencies assessed whether upstream waters have a "significant nexus" to downstream waters "in terms of the CWA's objective to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 37055. In doing so, the agencies relied substantially on a comprehensive report prepared by

EPA's Office of Research and Development, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Science Report), and review of this report by EPA's Science Advisory Board. The Science Report itself is based on a review of more than 1200 peer-reviewed publications. The Report and review by the Science Advisory Board concluded that tributary streams, and wetlands and open waters in floodplains and riparian areas, are connected to and strongly affect the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. *Id*. at 37057.

The agencies' current procedures for determining whether waters are within the Act's jurisdiction often entail detailed and time-consuming case-by-case analyses that can be inconsistent. The rule reduces the agencies' reliance on case-by-case analyses by establishing categories of jurisdictional waters that fall within the scope of the "water of the United States." These categories consist of: (1) traditional navigable waters, (2) interstate waters, (3) the territorial seas, (4) impoundments of jurisdictional waters, (5) tributaries, and (6) adjacent waters (which consist primarily of wetlands). The Rule also establishes

three categories of potentially jurisdictional waters, which fall within the scope of "waters of the United States" if a case-by-case analysis determines that they have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. These case-by-case waters are: (i) certain similarly situated regional waters (Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that drain to a water in categories 1 through 3 above; (ii) waters within the 100-year floodplain of a water in categories 1 through 3 above; and (iii) waters within 4,000 feet of the high tide line or ordinary high-water mark of a water in categories 1 through 5 above.

C. Challenges to the Rule

After publication of the rule, opponents of the rule filed various actions in federal district courts and petitions for review in eight circuit courts seeking to invalidate it. On July 28, 2015, the judicial panel on multidistrict litigation randomly selected the Sixth Circuit to hear the consolidated petitions.

ARGUMENT

PROPOSED STATE INTERVENORS' MOTION TO INTERVENE SHOULD BE GRANTED BECAUSE THEY HAVE A DIRECT AND SUBSTANTIAL INTEREST IN THE LEGALITY OF THE CLEAN WATER RULE

Rule 15(d) of the Federal Rules of Appellate Procedure (FRAP) requires that a party moving to intervene state its interest and the grounds for intervention. Intervention under Rule 15(d) is granted where the moving party's interests in the outcome of the action are direct and substantial. *See, e.g., Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome"); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (intervention allowed under Rule 15(d) because petitioners were "directly affected by" agency action). The decision to allow intervention should be guided by practical considerations and the "need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967).

The Supreme Court has suggested that "the policies underlying intervention [under Rule 24 of the Federal Rules of Civil Procedure] may be applicable in appellate courts." *Auto Workers v. Scofield*, 382

U.S. 205, 216 n.10 (1965). And other courts of appeals have looked to Rule 24 of the Federal Rules of Civil Procedure for standards governing intervention. *See Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). Under Rule 24(a), a motion to intervene as of right is granted if: (1) it is timely; (2) the movant has a substantial legal interest in the subject matter of the case that will be impaired in the absence of intervention; and (3) the parties already before the court do not adequately represent that interest. *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005). As with FRAP 15(d), Rule 24 should be "broadly construed in favor of potential intervenors." *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991).

Under any interpretation of the applicable standards, the Proposed Intervenor States' motion should be granted.

First, this motion is timely in seeking to intervene in each of the petitions (other than Docket No. 15-3751) because it is brought within 30 days after the petitions for review were filed in this Circuit. *See* FRAP 15(d). The States have separately brought a motion to extend their time to move to intervene in Docket No. 15-3751.

Next, the Proposed Intervenor States have a substantial and direct

interest in the subject of this action, namely the validity of the Clean Water Rule. That interest manifests itself in three principal ways. *First*, the rule protects the waters of Proposed Intervenor States. The rule is grounded in peer-reviewed scientific studies that confirm fundamental hydrologic principles. Water flows downhill, and connected waters, singly and in the aggregate, transport physical, chemical and biological pollution that affects the function and condition of downstream waters, as demonstrated by the Scientific Report on which EPA and the Army Corps rely. The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Moreover, watersheds frequently do not obey state boundaries, with all of the lower forty-eight states having waters that are downstream of the waters of other states. Thus, coverage under the Act of ecologically connected waters secured by the Rule is essential to achieve the water quality protection purpose of the Act, and to protect Proposed Intervenor States from upstream pollution occurring outside their borders.

Second, by clarifying the scope of "waters of the United States," the

rule promotes predictability and consistency in the application of the law, and in turn helps clear up the confusing body of case law that has emerged in the wake of the Supreme Court's *Rapanos* decision. The Rule accomplishes this by reducing the need for case-by-case jurisdictional determinations and, where such determinations are needed, by clarifying the standards for conducting them. Each of the Proposed Intervenor States implements programs under the Act. Thus, the rule is of direct benefit to movants because it helps alleviate administrative burdens and inefficiencies in carrying out those programs. In addition, the rule would help the States in administering the federal dredge-and-fill program if they choose to do so. *See* 33 U.S.C. §1344 (allowing States to implement a permitting program for dredge and fill material).

Third, the rule advances the Act's goal of securing a strong federal "floor" for water pollution control, thereby protecting the economic interests of Proposed Intervenor States and other downstream states. The Rule allows movants to avoid having to impose costly, disproportionate, and economically harmful limits on in-state pollution sources to waters within their borders, in order to offset

upstream discharges that would otherwise go unregulated if the upstream waters are deemed to fall outside the Act's jurisdiction and are not otherwise regulated by upstream states. The Rule protects the economies of Proposed Intervenor States because it serves to "prevent the 'Tragedy of the Commons' that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states." *NRDC*, 568 F.2d at 1378 (quoting *Train*, 510 F.2d at 709).

In summary, Proposed Intervenor States have direct and substantial interests in the outcome of these petitions, and invalidation of the rule would impair and impede these interests.

Moreover, while respondent federal agencies and the States both support the rule, their interests are distinct. As this Court has recognized, the required showing of inadequacy is "minimal because it need only be shown that there is a *potential* for inadequate representation." *United States v. Michigan*, 424 F.3d at 443 (quotations omitted; emphasis in original). EPA and the Army Corps cannot be assumed to adequately represent the interests of Proposed Intervenor States. *See Forest Conserv. Council v. U.S. Forest Serv.,* 66 F.3d 1489,

1499 (9th Cir. 1995) (the interests of one governmental entity may not be the same as those of another governmental entity). For example, EPA and the Army Corps may seek to settle or resolve the petitions and other related cases brought by non-parties to the petitions in ways that might be adverse to the States' interests, or may rely upon legal doctrines that otherwise undermine their interests. Under this Court's precedents, "[i]nterests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991). Indeed, "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (emphasis in original). Because of the unique interests and role of the States in implementing the Act's programs, EPA and the Army Corps cannot be expected to make the same arguments in support of the Rule as the States would. Under these standards, the motion to intervene should be granted.

CONCLUSION

For the reasons stated above, the Proposed Intervenor States respectfully request that this Court grant their motion to intervene in these proceedings.

Dated: Albany, New York
August 28, 2015

Respectfully submitted,

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**Applying for Admission to*
Sixth Circuit Bar

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Docket No. 15-3751

and related cases:
15-3799, 15-3817,
15-3820, 15-3822,
15-3823, 15-3831,
15-3837, 15-3839,
15-3850, 15-3853,
15-3858, 15-3885,
15-3887

IN RE: ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF DEFENSE,	:
FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE	:
UNITED STATES," 80 FED. REG. 37,054 PUBLISHED ON JUNE 29, 2015 (MCP NO. 135).	:

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on August 28, 2015, I served through the ECF system all counsel of petitioners and respondents who have filed notices of appearance in the above captioned cases with a copy of the MOTION BY STATES OF NEW YORK, CONNECTICUT, HAWAII, MASSACHUSETTS, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA, TO INTERVENE IN SUPPORT OF RESPONDENTS IN DOCKET NO. 15-3751 AND IN EACH OF THE RELATED CASES, dated August 28, 2015.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, *ET AL.*,
Petitioners,
v.
U.S. ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

No. 15-3799

and related proceedings:

No. 15-3822
No. 15-3853
No. 15-3887

OPPOSITION TO A STAY PENDING REVIEW BY THE STATES OF NEW YORK, CONNECTICUT, HAWAII, MASSACHUSETTS, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA

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PRELIMINARY STATEMENT

Intervenor States support the Clean Water Rule issued by the Environmental Protection Agency ("EPA") and the Army Corps of Engineers (together, "the Agencies"), and oppose the motion of Petitioner States for a nationwide stay of the Rule. The Rule defines the term "waters of the United States" as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.,* thereby establishing the scope of protection under the Act. *See* 80 Fed. Reg. 37054 (June 29, 2015). The motion should be denied because Petitioner States fail to show that they will likely succeed on the merits or that the balance of equities favors a stay—particularly since the Intervenor States support the Rule and would be significantly harmed by a stay.

ARGUMENT

THIS COURT SHOULD DENY THE MOTION FOR A STAY

As a threshold matter, this Court has not yet determined whether it has jurisdiction. Petitioner States have filed two motions in this Court: one for a stay pending review, and another to dismiss their petitions for lack of jurisdiction. Briefing on jurisdiction will not be complete until November 4, 2015. Thus, a stay should be denied at this point because of the pending jurisdictional question. In any event,

Petitioner States have not carried their heavy burden to establish that a stay is justified here.

A stay is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985), amounting to "an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations omitted). A "stay is not a matter of right, even if irreparable injury might otherwise result," but rather, "an exercise of judicial discretion." *Nken*, 556 U.S. at 433 (quotations omitted); *see also Ohio State Conference of N.A.A.C.P. v. Husted,* 769 F.3d 385, 387 (6th Cir. 2014). In analyzing a stay request, courts consider the likelihood of success on the merits and three equitable factors: whether the movant will suffer irreparable injury; whether the stay would cause substantial harm to others; and whether the public interest would be served by the stay. *Nken*, 556 U.S. at 434; *see also Husted,* 769 F.3d at 387. Here, the equitable factors cut strongly against a stay and the Petitioner States are unlikely to succeed on the merits.

POINT I

THE EQUITIES CUT AGAINST A STAY BECAUSE THE BENEFITS OF THE RULE FAR OUTWEIGH ITS POTENTIAL ADMINISTRATIVE COSTS

The equitable factors here militate strongly against granting a stay because the Petitioner States have shown no likelihood of irreparable injury, and because a stay would significantly harm the public, the Intervenor States, and indeed the Petitioner States themselves. It is pure speculation to assert that the alleged meager increase in states' administrative costs will outweigh the significant environmental and administrative benefits the Rule will bring.

A. The Rule Will Have Significant Environmental and Economic Benefits.

Environmental Benefits. The "defacement of the environment" is an appropriate factor to consider in weighing a stay. *Envt'l Def. Fund v. TVA*, 468 F.2d 1164, 1183 (6th Cir. 1972). Here, it weighs strongly against a stay. The Rule enhances environmental protection by better tailoring the Act's reach to cover those waters that significantly contribute to the "chemical, physical, and biological integrity" of downstream waters—as suggested by Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715, 780 (2006). To the extent that

the Rule's improved tailoring increases the number of waters deemed to be protected by the Act, environmental benefits will likewise increase.

The Clean Water Act represents Congress's considered judgment about the measures that need to be taken, and costs to be incurred, to remedy America's "severely polluted" waters."[1] Upstream waters, singly and in the aggregate, transport pollution that affects the function and condition of downstream waters, as demonstrated by the robust Scientific Report on which the Agencies rely. In addition, "[p]eer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, play a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes in downstream waters." EPA, Response to Comments, Topic 9, at 13.[2] Thus, identifying all of the

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[1] S. Rep. No. 92-414, (1972), reprinted in 1 Environmental Policy Division, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1425 (U.S. G.P.O. 1973); H. Rep. No 92-911, at 66 (1972), *reprinted in* I 1972 Leg. Hist., at 753.

[2] This brief cites several documents supplemental to the Rule, available at http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule.

upstream waters that have a significant impact on downstream waters—and thus are covered—is crucial for water-quality protection.

For example, the Act enhances downstream water quality by prohibiting discharges of dredge or fill material unless authorized by a permit. 33 U.S.C. §§ 1311(a), 1344. As noted by Justice Kennedy in his concurrence in *Rapanos*, filling wetlands "may increase downstream pollution, much as a discharge of toxic pollutants would." 547 U.S. at 775. Petitioner States make no attempt to argue that filling a wetland is a less significant or irreparable injury than the costs of administering a program that protects that wetland.

Similarly, the Act prohibits pollutant discharges into covered waters unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342. Again, Petitioner States make no attempt to argue that the discharge of a pollutant into a water-body is a less significant injury than the costs of administering a program that protects it.

The Agencies relied on a massive collection of scientific research, public input, and their own extensive expertise to implement the Act's protections against the injuries caused by wetland destruction and

pollution. *See* 80 Fed. Reg. at 37,055. The Petitioner States offer no evidence that the Agencies overestimated the environmental significance of the Rule. And they are wrong to say that the Agencies "justified the Rule as providing greater predictability . . . rather than cleaner waters." (Mot. at 20.) The basis for asserting jurisdiction over the waters in question is precisely that they have a "significant nexus" to downstream waters—a nexus defined in terms of the jurisdictional waters' effect on "the chemical, physical, and biological integrity of the Nation's waters." *Id*. at 37,055.

Protection of Downstream States. A second category of benefits Petitioner States ignore is the economic and environmental injuries that water pollution inflicts on downstream states. Watersheds do not respect state boundaries. All of the lower forty-eight states have waters that are downstream of other states' waters. By protecting states from upstream pollution that originates outside their borders, the Act protects states against harms they cannot avoid without federal help.

If the Act did not protect downstream states against pollution from upstream states, downstream states would have to regulate their own in-state pollution sources more strictly, to offset pollution from out-of-

state sources. But stricter regulation of in-state sources could unfairly threaten states' economies. The Rule protects states' economic interests by "prevent[ing] the 'Tragedy of the Commons' that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (quotes omitted).

The Benefits of Avoiding Uncertainty. A third category of benefits that Petitioner States ignore is the resources—including administrative costs—that the Rule will conserve by clearly defining the scope of "waters of the United States." The Rule promotes predictability and consistency in the application of the law. It helps clear up the confusing body of case law that has emerged in the wake of *Rapanos*. The Rule reduces the need for case-by-case jurisdictional determinations and, where such determinations are needed, clarifies the standards for conducting them. It therefore saves administrative costs at the federal level, for the state agencies that have to make judgments under the Act, and for private parties who may be subject to the Act's coverage.

B. The States' Estimates of Administrative Costs Are Speculative and Exaggerated.

The Petitioner States argue that they will suffer irreparable harm because the Rule will force them to incur administrative costs, but the costs they invoke are too speculative and insubstantial to justify staying the Rule. (Mot. at 17-18.) In evaluating harms, this Court looks to their substantiality, their likelihood, and the adequacy of the proof provided. *Mich. Coal. of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). The Petitioner States have not identified any substantial, likely injury, because their claims of harm are based on speculation about the extent to which the Rule will increase coverage under the Act, and about the administrative costs they will incur.

Speculation About an Increase in Territory Covered. State Petitioners claim in conclusory fashion that there will be a large "potential" geographic increase in the Act's coverage in their states. (ECF No. 16 at 46 ¶ 6.) But the Agencies estimate only that the Rule will lead to "an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually." 80 Fed. Reg. at 37,101. Moreover, State Petitioners' claims about the potential geographic increase is speculative and unsupported by the record. As the Army

Corps noted, "No analysis was made to determine the actual number of acres of waters that would be [covered] and for this reason it is not possible to estimate the number of acres that would be captured by this increase in positive jurisdictional determinations." Environmental Assessment at 22. Petitioners' claims therefore fail to support a stay, because "the harm alleged must be both certain and immediate, rather than speculative or theoretical." *Mich. Coal.*, 945 F.2d at 154.

In fact, there is reason to think that the Rule will decrease the number of covered waters in certain categories. For example, the definition of "tributary" is more restrictive: while the old definition required only that a water have an ordinary high-water mark, the new definition requires both an ordinary high-water mark and a "bed and banks." (*See* p. 15, below.) So in at least this respect, the Rule reduces the total number of waters that qualify nationwide.

Speculation About Administrative Costs. As for specific costs, the States claim they will have to identify newly jurisdictional waters and determine whether they are subject to an already-existing water-quality standard. But review of water-quality standards is required only once every three years. 40 C.F.R. § 131.20(a); *see* 33 U.S.C.

§ 1313(c)(1). And while waters that do not meet the water-quality standards require the issuance of a total maximum daily load ("TMDL"), nothing in the Act sets a hard deadline for the issuance of a TMDL. *S.F. Baykeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). The State Petitioners therefore do not establish that a stay is necessary *before* this Court reviews the merits of their claims—much less before it reviews their argument that the Court lacks jurisdiction altogether.

Even less persuasive are the Petitioner States' claims that they will have to incur costs associated with certifications under § 401 of the Act for dredge-and-fill permits, and NPDES permit applications. They can simply charge fees to offset much or all of these costs, as many states do. *See, e.g.*, Ga. Code Ann. § 12-5-23*;* Ga. Comp. R. & Regs. § 391-3-6-.22. They make no contention that the fees they are allowed to charge are inadequate to cover the costs of these programs. Moreover, states can simply waive the 401 certification. *See* 33 U.S.C. § 1341(a)(1). And in any event, the Petitioner States do not actually allege that they will receive any such applications—merely that they may incur costs "*[i]f* individual permit applications are filed on a previously non-

jurisdictional water body." (McClary Decl., ECF No. 16 at P000007.) Such speculation cannot establish irreparable harm.

C. State Sovereignty Is Not At Stake Here

The Petitioner States have also not identified any way in which the Rule harms them by infringing their sovereignty. As discussed below, their Constitutional claims are without merit. And when the Petitioner States argue that they will "lose their sovereignty over intrastate waters" (Mot. at 16), they appear to mean only that the federal law will protect certain of their waters that they might prefer to leave federally unregulated. The States' policy disagreement with an otherwise-valid federal regulation does not constitute a loss of sovereignty—particularly since numerous states support the federal regulation and believe that it protects their vital interests.

POINT II

PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. The Final Rule Was a Logical Outgrowth of the Proposed Rule

Under the Administrative Procedure Act, agencies "may issue rules that do not exactly coincide with the proposed rule as long as the final rule is the 'logical outgrowth' of the proposed rule." *Fertilizer Inst.*

v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991). "Under the 'logical outgrowth' test . . ., the key question is whether commenters 'should have anticipated' that EPA might" issue the final rule it did. *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007).

State Petitioners claim that the final Rule is not a "logical outgrowth" because it includes distance-based limitations in its definitions of "adjacent waters" and in its case-by-case procedures. But Petitioners were on notice that distance-based limitations were contemplated. The preamble to the proposed rule sought public input on the proposed definition of "adjacent waters," and requested comments on "other reasonable options for providing clarity," including those "establishing specific geographic limits" such as "distance limitations." 79 Fed. Reg. at 22,208/1, 22,209/1-2; *see* 80 Fed. Reg. at 37,088-37,091 (discussing public comments on distance-based limitations). It should be no surprise that when the Agencies solicited comments on how to achieve "greater clarity, certainty, and predictability" in case-by-case determinations, distance-based limitations were among the logical options. *Id.* at 22,214; *see also* 80 Fed. Reg. at 37,057 (noting that many commenters and stakeholders "urged EPA to improve upon the 2014

proposal, by providing more bright line boundaries"). The Rule is a logical outgrowth of the proposed rule.

B. The Agencies Were Not Arbitrary and Capricious in Setting Distance Limitations

The distance limitations for the Act's reach are not arbitrary and capricious. As Chief Justice Roberts observed, the Agencies are to be "afforded generous leeway by the courts in interpreting the statute . . . [including] plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Rapanos*, 547 U.S. at 758. The record reflects the importance of distance. *See* Technical Support Document at 112 ("Spatial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters."); *see also* 80 Fed. Reg. at 37,085-86 (discussing scientific basis for including waters located within distance limitations). And "bright-line tests are a fact of regulatory life," necessary for administrative practicality. *Macon Cty. Samaritan Mem. Hosp. v. Shalala*, 7 F.3d 762,

768-69 (8th Cir. 1993). It would be inappropriate to second-guess these expert and highly technical judgments at this early juncture.

C. The Rule Is Consistent With Justice Kennedy's Opinion In *Rapanos*

Tributaries. The Rule does not run afoul of Justice Kennedy's opinion by including "tributaries" within the "waters of the United States." Justice Kennedy made clear that even minor tributaries can reasonably lie within the Act's jurisdiction. He observed that the standard for tributaries implemented by the Agencies at the time of *Rapanos* required the presence of an ordinary high-water mark, and stated that this standard "presumably provides a rough measure of the volume and regularity of flow," and therefore "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters." 547 U.S. at 781.

Significantly, the Rule takes a more exacting approach to jurisdictional tributaries than that approved by Justice Kennedy. The Rule defines a tributary as a water that contributes flow to a traditional navigable water and possesses "the physical indicators of a bed and banks *and* an ordinary high water mark." 33 C.F.R. § 328.3(c)(3)

(emphasis added). Thus, in at least this respect, the Rule's requirement that a tributary have a bed and bank, in addition to an ordinary high water mark, tends to *reduce* jurisdiction over such waters when compared to agency practice at the time of *Rapanos*. *Compare* Rule, 33 C.F.R. § 328.3(c)(3)(iii) (requiring a bed and bank) *with* Army Corps, Regulatory Guidance Ltr. No. 05-05, Dec. 7, 2005 at 3 (an ordinary high-water mark can be demonstrated by evidence other than the presence of bed and banks).

State Petitioners wrongly attribute to Justice Kennedy the view "that the CWA cannot cover all 'continuously flowing stream[s] (however small)' or waters sending only the merest 'trickle[s]' into navigable waters." (Mot. at 13.) The quoted language is from an early portion of Justice Kennedy's opinion that was not addressing what tributaries the "CWA cannot cover," but instead pointing out an internal inconsistency in the plurality opinion's views on wetlands. Justice Kennedy observed that the plurality's requirement of a continuous surface-water connection would "permit applications of the statute [to remote wetlands connected with a continuously flowing stream (however small)]," even though such wetlands could be "as far

from traditional federal authority as are the waters [the plurality] deems beyond the statute's reach." 547 U.S. at 776-77. Similarly, the language about the "merest trickle" also points to inconsistency in the plurality opinion. *Id.* at 769. But neither quote endorses any limitation on the Act's applicability to tributaries; Justice Kennedy was merely setting the stage for his own significant-nexus test.

Adjacent Waters. State Petitioners are also wrong in claiming that the Rule's coverage of adjacent waters (typically wetlands) fails Justice Kennedy's test. Justice Kennedy opined that the Act could not apply to all wetlands adjacent to certain tributaries, such as "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* at 782. But the Rule excludes many of the adjacent wetlands that were of concern to Justice Kennedy. It does so by reducing the number of "tributaries" deemed covered, thus reducing coverage of wetlands adjacent to them. *See* 80 Fed. Reg. at 37,058 col.3. To be a tributary, there now must be evidence showing a bed and bank as well as an ordinary high-water mark. *Id.* at 37,058. As determined by the Agencies based on an extensive scientific record, "sufficient volume, duration, and frequency of flow are required

to create a bed and banks and ordinary high water mark." 80 Fed. Reg. at 37,066. Thus, under the Rule's definition, tributaries do not carry "only minor water volumes," as the Petitioner States argue, and jurisdiction over wetlands adjacent to them does not fail Justice Kennedy's test.

Similarly, the Rule addresses Justice Kennedy's concerns by excluding minor and remote waters from its definition of tributaries, thereby excluding wetlands adjacent to them from the Act's reach. Among these exclusions are three categories of "ditches" that have low flow or are remote from navigable-in-fact waters, 33 C.F.R. § 328.3(b)(3)(i), (ii), and (iii); certain stormwater-control features (including "drains"), *id.* § 328.3(b)(6); and limits on certain adjacent waters to those found within specific distances of other waters—which excludes "remote" waters from the Act's reach, *id.* § 328.3(c)(1), (2).

Case-by-Case Coverage. In addition to establishing categories of waters that automatically qualify as waters of the United States, the Rule sets guidelines for making case-by-case determinations. 33 C.F.R. § 328.3(c)(5). These guidelines are on all fours with Justice Kennedy's significant-nexus test. They require an evaluation of nine aquatic

functions to determine whether any function performed by particular waters, whether taken alone or in combination with other functions, contributes significantly to the chemical, physical or biological integrity of nearby downstream waters. *Id.*

Contrary to State Petitioners' assertion, when Justice Kennedy discussed the Act's objectives to "restore and maintain the chemical, physical, and biological integrity' of the Nation's waters, 547 U.S. at 780 (citing 33 U.S.C. § 1251(a)), he never asserted that *each* of these three statutory objectives must be served before a water lies within the Act's protections. Regardless, the nine functions assessed under the Rule generally serve all three objectives. For example, "contribution of flow," cited by State Petitioners, can affect the integrity of downstream waters in multiple respects: physically, by helping to sustain the volume of water in larger waters; chemically, by changing the dissolved-oxygen composition of the water column; and biologically, by supplying downstream waters with organic matter that sustains the food web. *See* 80 Fed. Reg. at 37,068. Moreover, contrary to State Petitioners' claim, the Agencies' discussions of the biological process of "dispersal" in the Rule's preamble and in the Science Report do not contravene *SWANCC*

v. Army Corps, 531 U.S. 159 (2001). The Agencies never endorse jurisdiction under the Act based upon dispersal involving migratory birds living in hydrologically unconnected waters, such as the isolated former sand and gravel pits at issue in *SWANCC*.

D. The Rule Does Not Violate the Constitution

Under *SWANCC* and Justice Kennedy's opinion in *Rapanos*, the application of the Act to waters that lack a significant nexus to traditional navigable waters raises constitutional difficulties and federalism concerns. *Rapanos*, 47 U.S. at 776. But "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). As explained above and in much more detail in the preamble to the Rule, the categories of waters covered by the Rule all bear a significant nexus to traditional navigable waters and that conclusion is supported by voluminous, peer-reviewed scientific evidence.

The Rule does not offend the Tenth Amendment because such federal regulation of private activity to prevent pollution does not create

a cognizable harm to state sovereignty. *See Hodel*, 452 U.S. at 284-93. The Rule does not present constitutional or federalism difficulties because the Agencies applied the significant-nexus test in defining the Act's reach, and because the Rule addresses water pollution affecting more than one State. As Justice Kennedy explained, the Act's policy of respecting the "responsibilities and rights" of states, *see* 33 U.S.C. § 1251(b), encompasses respect for state water-pollution policies favoring federal action to "protect[] downstream States from out-of-state pollution that they cannot themselves regulate." 547 U.S. at 777.

As discussed above, the Rule is important to the Intervenor States because it protects their waters from interstate pollution, facilitates implementation of their own water programs, and protects their related economic interests. Accordingly, the Rule actually furthers the Tenth Amendment and federalism by protecting the interests of states. *See United States v. Wash. Suburban San. Comm'n*, 654 F.2d 802, 807 (D.C. Cir. 1981) (Tenth Amendment challenge to Act does not lie where it would cause injury to states).

CONCLUSION

The motion for a nationwide stay of the Clean Water Rule pending this Court's review should be denied.

Dated: Albany, New York
September 23, 2015

Respectfully submitted,

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STATE OF NEW YORK

NOV 13 2014

VIA EMAIL: ow-docket@epa.gov

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Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

RE: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880

The New York State Departments of Environmental Conservation (DEC) and Agriculture and Markets (DAM) offer the following comments to the proposed national rulemaking Definition of "Waters of the United States" Under the Clean Water Act (79 Fed. Reg. 22188, April 21, 2014), hereinafter, "proposed rule." DEC and DAM appreciate the purpose of the joint rulemaking by the Environmental Protection Agency and the U.S. Army Corps of Engineers as an attempt to clarify what types of bodies of water will be regulated by the Clean Water Act. As a pollution prevention statute, Congress wrote the CWA to extend beyond waters that are actually navigable to include the headwater streams, lakes, and wetlands.

However, after an in-depth analysis of the proposed rule, and as discussed below, DEC and DAM find that the proposed rule does not achieve its goal of providing clarity. Therefore, we request that EPA and the Army Corps significantly revise and renotice its proposed rule for public comment. This should occur only after consultation with states and recognize the significant regional differences of water resources across the country. A one-size-fits-all approach to redefining regulated waters will only lead to legal challenges, cause unnecessary harm to farmers, and could lead to other unintended consequences while at the same time not achieving the Administration's stated goal.

Early Consultation with States for a Successful Rulemaking Process

We recognize and appreciate that EPA and, to a lesser extent, the Army Corps, made some efforts to reach out to the states and regulated entities both before releasing the proposed rule and during the comment period. However, meaningful early consultation to identify the regulatory impacts to states and local governments did not occur. There is concern among the regulated community that the Waters of the United States regulation could result in amendments to already-approved permits, and/or make it more difficult and time consuming to obtain a future permit.

Under the proposed rule, we cannot determine its impact on existing or future projects since the normal processes for outreach and comment were not followed, including necessary consultation with the states and local governments. For example, the proposed rule could be easy to implement, with little change in existing DEC permitting activities. Alternatively, depending upon EPA/USACE interpretation of the regulation, it is also possible that the federal agencies could place new requirements on projects which could slow their implementation. If so, many initiatives, including the implementation of projects to restore areas affected by Superstorm Sandy could be affected.

Additionally, there is little to no regional flexibility in the proposed rule. The geography of the northeast is different than that of the southwest, for example. New York State, with its rocky terrain and multitude of glacial lakes is a complicated environment that requires a tailored permitting process. New York State already has some of the strongest water quality programs in place, and could work with EPA/USACE to craft New York-specific guidance which would clearly apply to New York's waters. This approach is consistent with the way in which EPA has handled other water quality issues under the CWA.

New York has long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules, and the EPA and the Army Corps should consider restarting the effort to redefine waters of the U.S. with state agency partners fully engaged as co-regulators prior to and during the rulemaking process. A partnership with the states should be an essential component of revising and renoticing this rule.

New York State Places a Priority on Its Natural Resources and Its Agricultural Industry

New York has long been a national leader on environmental quality and natural resource protection. Water systems under the jurisdiction of the proposed rule, including wetlands, are valued in New York for their myriad environmental benefits, including resiliency. As discussed in the preliminary report released by the NYS2100 Commission after Superstorm Sandy[1], "(n)atural features, such as wetlands and streams, should be protected."[2]

Almost 36,000 farms in New York State produce high quality fruits, vegetables and dairy products which are sold to markets around the world, and we are committed to safeguarding their economic and environmental viability. Under the proposed rule, the redefinition of navigable is an expansion of the waters of the U.S. to now include many lands as part of jurisdictional 'waters' to be regulated. As a result, activities that have been unregulated may now be regulated or must fall into a specific exemption. Ambiguous or contradictory definitions for what types of bodies of water to be regulated will negatively harm the farming community, even if they support the overall goal of stemming the flow of all types of water pollution – confusion can

1 Recommendations to Improve the Strength and Resilience of the Empire State's Infrastructure ("Report")
2 Report, p. 128

carry significant costs. Our farmers are the backbone of our state economy, but they operate on the thinnest of margins. If farmers are expected to implement any new regulations and rules, they must be well thought out and understandable. Farmers cannot be expected to change their operational practices year after year.

Given the high value which New York State places upon the agricultural industry and water systems, *effective* federal initiatives that compliment New York's natural resource protection measures are a priority for the State.

Need for Clarity in the Waters of the US Rulemaking

The proposed rule lacks the clarity needed to be effective. As currently drafted, the rule leaves too much room for interpretation and case-by-case evaluations of whether certain waterbodies are jurisdictional under the CWA. This will ultimately lead to discrepancies, both among states and potentially, within individual states, in the interpretation of its provisions. If adopted, the proposed rule will likely result in legal challenges, continuing the uncertainty over CWA jurisdiction.

The lack of clarity in the proposed rule prevents New York State from providing meaningful comments about the impacts of the proposal. Specifically, the following terms are undefined or not clearly defined in the proposed rule, leaving wide latitude for interpretation and prompting legal challenges:

- Tributary;
- Upland;
- Adjacent waters;
- Shallow subsurface hydrologic connections as "neighboring" waters;
- Floodplain; and
- Significant nexus.

We recommend that a significantly revised rule clearly defines these terms and provide examples of what EPA and the Army Corps believe are encompassed by them. This will enable the states to better understand the intent of EPA and the Army Corps and successfully implement the rule. The regulated community will also be able to better understand the rule's requirements.

Ensure a Level Playing Field for All States

In revising the proposed rule, we encourage EPA and the Army Corps to ensure a level playing field for all states and regulated entities. For example, New York already has in place strong programs to protect waters and wetlands. The federal rule should set a strong regulatory floor which will ensure that all states have a strong basis for protecting water quality and habitats, while also ensuring that local economies can thrive. As long as states remain consistent with a strong national program, the option for the development of EPA-approved regional or state

alternative guidance on jurisdictional waters, as EPA has done in other water quality regulations, may be useful in better defining the waters of the United States. This approach would help ensure flexibility in a manner that best meets the needs of the states that will be involved in implementing this rule.

We request EPA and the Army Corps work with our Departments to rethink this proposal in a way which recognizes New York's sound water quality programs and provides the level national playing field that we need.

We strongly urge EPA and the Army Corps to significantly revise the proposed rule, taking into account the points articulated above. By doing so, EPA and the Army Corps will have the opportunity to ensure that the new proposed rule provides New York with an early and meaningful engagement in the process; ensure clarity and flexibility to states who will be involved in its implementation; afford a fair and level playing field for all potentially regulated entities; and ensure that the goals of the CWA are met.

Sincerely,

Joseph. J. Martens
Commissioner
Department of Environmental Conservation

Richard A. Ball
Commissioner
Department of Agriculture and Markets

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF OHIO, *ET AL.*,
Petitioners,
v.
U.S. ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

No. 15-3799

and related proceedings:

No. 15-3822
No. 15-3853
No. 15-3887

OPPOSITION TO A STAY PENDING REVIEW BY THE STATES OF NEW YORK, CONNECTICUT, HAWAII, MASSACHUSETTS, OREGON, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA

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PRELIMINARY STATEMENT

Intervenor States support the Clean Water Rule issued by the Environmental Protection Agency ("EPA") and the Army Corps of Engineers (together, "the Agencies"), and oppose the motion of Petitioner States for a nationwide stay of the Rule. The Rule defines the term "waters of the United States" as used in the Clean Water Act, 33 U.S.C. § 1251 *et seq.,* thereby establishing the scope of protection under the Act. *See* 80 Fed. Reg. 37054 (June 29, 2015). The motion should be denied because Petitioner States fail to show that they will likely succeed on the merits or that the balance of equities favors a stay—particularly since the Intervenor States support the Rule and would be significantly harmed by a stay.

ARGUMENT

THIS COURT SHOULD DENY THE MOTION FOR A STAY

As a threshold matter, this Court has not yet determined whether it has jurisdiction. Petitioner States have filed two motions in this Court: one for a stay pending review, and another to dismiss their petitions for lack of jurisdiction. Briefing on jurisdiction will not be complete until November 4, 2015. Thus, a stay should be denied at this point because of the pending jurisdictional question. In any event,

Petitioner States have not carried their heavy burden to establish that a stay is justified here.

A stay is an "extraordinary remedy," *Cuomo v. U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985), amounting to "an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations omitted). A "stay is not a matter of right, even if irreparable injury might otherwise result," but rather, "an exercise of judicial discretion." *Nken*, 556 U.S. at 433 (quotations omitted); *see also Ohio State Conference of N.A.A.C.P. v. Husted,* 769 F.3d 385, 387 (6th Cir. 2014). In analyzing a stay request, courts consider the likelihood of success on the merits and three equitable factors: whether the movant will suffer irreparable injury; whether the stay would cause substantial harm to others; and whether the public interest would be served by the stay. *Nken*, 556 U.S. at 434; *see also Husted,* 769 F.3d at 387. Here, the equitable factors cut strongly against a stay and the Petitioner States are unlikely to succeed on the merits.

POINT I

THE EQUITIES CUT AGAINST A STAY BECAUSE THE BENEFITS OF THE RULE FAR OUTWEIGH ITS POTENTIAL ADMINISTRATIVE COSTS

The equitable factors here militate strongly against granting a stay because the Petitioner States have shown no likelihood of irreparable injury, and because a stay would significantly harm the public, the Intervenor States, and indeed the Petitioner States themselves. It is pure speculation to assert that the alleged meager increase in states' administrative costs will outweigh the significant environmental and administrative benefits the Rule will bring.

A. The Rule Will Have Significant Environmental and Economic Benefits.

Environmental Benefits. The "defacement of the environment" is an appropriate factor to consider in weighing a stay. *Envt'l Def. Fund v. TVA*, 468 F.2d 1164, 1183 (6th Cir. 1972). Here, it weighs strongly against a stay. The Rule enhances environmental protection by better tailoring the Act's reach to cover those waters that significantly contribute to the "chemical, physical, and biological integrity" of downstream waters—as suggested by Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715, 780 (2006). To the extent that

the Rule's improved tailoring increases the number of waters deemed to be protected by the Act, environmental benefits will likewise increase.

The Clean Water Act represents Congress's considered judgment about the measures that need to be taken, and costs to be incurred, to remedy America's "severely polluted" waters."[1] Upstream waters, singly and in the aggregate, transport pollution that affects the function and condition of downstream waters, as demonstrated by the robust Scientific Report on which the Agencies rely. In addition, "[p]eer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, play a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes in downstream waters." EPA, Response to Comments, Topic 9, at 13.[2] Thus, identifying all of the

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[1] S. Rep. No. 92-414, (1972), reprinted in 1 Environmental Policy Division, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1425 (U.S. G.P.O. 1973); H. Rep. No 92-911, at 66 (1972), *reprinted in* I 1972 Leg. Hist., at 753.

[2] This brief cites several documents supplemental to the Rule, available at http://www2.epa.gov/cleanwaterrule/documents-related-clean-water-rule.

upstream waters that have a significant impact on downstream waters—and thus are covered—is crucial for water-quality protection.

For example, the Act enhances downstream water quality by prohibiting discharges of dredge or fill material unless authorized by a permit. 33 U.S.C. §§ 1311(a), 1344. As noted by Justice Kennedy in his concurrence in *Rapanos*, filling wetlands "may increase downstream pollution, much as a discharge of toxic pollutants would." 547 U.S. at 775. Petitioner States make no attempt to argue that filling a wetland is a less significant or irreparable injury than the costs of administering a program that protects that wetland.

Similarly, the Act prohibits pollutant discharges into covered waters unless the discharge is authorized by a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342. Again, Petitioner States make no attempt to argue that the discharge of a pollutant into a water-body is a less significant injury than the costs of administering a program that protects it.

The Agencies relied on a massive collection of scientific research, public input, and their own extensive expertise to implement the Act's protections against the injuries caused by wetland destruction and

pollution. *See* 80 Fed. Reg. at 37,055. The Petitioner States offer no evidence that the Agencies overestimated the environmental significance of the Rule. And they are wrong to say that the Agencies "justified the Rule as providing greater predictability . . . rather than cleaner waters." (Mot. at 20.) The basis for asserting jurisdiction over the waters in question is precisely that they have a "significant nexus" to downstream waters—a nexus defined in terms of the jurisdictional waters' effect on "the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 37,055.

Protection of Downstream States. A second category of benefits Petitioner States ignore is the economic and environmental injuries that water pollution inflicts on downstream states. Watersheds do not respect state boundaries. All of the lower forty-eight states have waters that are downstream of other states' waters. By protecting states from upstream pollution that originates outside their borders, the Act protects states against harms they cannot avoid without federal help.

If the Act did not protect downstream states against pollution from upstream states, downstream states would have to regulate their own in-state pollution sources more strictly, to offset pollution from out-of-

state sources. But stricter regulation of in-state sources could unfairly threaten states' economies. The Rule protects states' economic interests by "prevent[ing] the 'Tragedy of the Commons' that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (quotes omitted).

The Benefits of Avoiding Uncertainty. A third category of benefits that Petitioner States ignore is the resources—including administrative costs—that the Rule will conserve by clearly defining the scope of "waters of the United States." The Rule promotes predictability and consistency in the application of the law. It helps clear up the confusing body of case law that has emerged in the wake of *Rapanos*. The Rule reduces the need for case-by-case jurisdictional determinations and, where such determinations are needed, clarifies the standards for conducting them. It therefore saves administrative costs at the federal level, for the state agencies that have to make judgments under the Act, and for private parties who may be subject to the Act's coverage.

B. The States' Estimates of Administrative Costs Are Speculative and Exaggerated.

The Petitioner States argue that they will suffer irreparable harm because the Rule will force them to incur administrative costs, but the costs they invoke are too speculative and insubstantial to justify staying the Rule. (Mot. at 17-18.) In evaluating harms, this Court looks to their substantiality, their likelihood, and the adequacy of the proof provided. *Mich. Coal. of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). The Petitioner States have not identified any substantial, likely injury, because their claims of harm are based on speculation about the extent to which the Rule will increase coverage under the Act, and about the administrative costs they will incur.

Speculation About an Increase in Territory Covered. State Petitioners claim in conclusory fashion that there will be a large "potential" geographic increase in the Act's coverage in their states. (ECF No. 16 at 46 ¶ 6.) But the Agencies estimate only that the Rule will lead to "an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually." 80 Fed. Reg. at 37,101. Moreover, State Petitioners' claims about the potential geographic increase is speculative and unsupported by the record. As the Army

Corps noted, "No analysis was made to determine the actual number of acres of waters that would be [covered] and for this reason it is not possible to estimate the number of acres that would be captured by this increase in positive jurisdictional determinations." Environmental Assessment at 22. Petitioners' claims therefore fail to support a stay, because "the harm alleged must be both certain and immediate, rather than speculative or theoretical." *Mich. Coal.*, 945 F.2d at 154.

In fact, there is reason to think that the Rule will decrease the number of covered waters in certain categories. For example, the definition of "tributary" is more restrictive: while the old definition required only that a water have an ordinary high-water mark, the new definition requires both an ordinary high-water mark and a "bed and banks." (*See* p. 15, below.) So in at least this respect, the Rule reduces the total number of waters that qualify nationwide.

Speculation About Administrative Costs. As for specific costs, the States claim they will have to identify newly jurisdictional waters and determine whether they are subject to an already-existing water-quality standard. But review of water-quality standards is required only once every three years. 40 C.F.R. § 131.20(a); *see* 33 U.S.C.

§ 1313(c)(1). And while waters that do not meet the water-quality standards require the issuance of a total maximum daily load ("TMDL"), nothing in the Act sets a hard deadline for the issuance of a TMDL. *S.F. Baykeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). The State Petitioners therefore do not establish that a stay is necessary *before* this Court reviews the merits of their claims—much less before it reviews their argument that the Court lacks jurisdiction altogether.

Even less persuasive are the Petitioner States' claims that they will have to incur costs associated with certifications under § 401 of the Act for dredge-and-fill permits, and NPDES permit applications. They can simply charge fees to offset much or all of these costs, as many states do. *See, e.g.*, Ga. Code Ann. § 12-5-23; Ga. Comp. R. & Regs. § 391-3-6-.22. They make no contention that the fees they are allowed to charge are inadequate to cover the costs of these programs. Moreover, states can simply waive the 401 certification. *See* 33 U.S.C. § 1341(a)(1). And in any event, the Petitioner States do not actually allege that they will receive any such applications—merely that they may incur costs "*[i]f* individual permit applications are filed on a previously non-

jurisdictional water body." (McClary Decl., ECF No. 16 at P000007.) Such speculation cannot establish irreparable harm.

C. State Sovereignty Is Not At Stake Here

The Petitioner States have also not identified any way in which the Rule harms them by infringing their sovereignty. As discussed below, their Constitutional claims are without merit. And when the Petitioner States argue that they will "lose their sovereignty over intrastate waters" (Mot. at 16), they appear to mean only that the federal law will protect certain of their waters that they might prefer to leave federally unregulated. The States' policy disagreement with an otherwise-valid federal regulation does not constitute a loss of sovereignty—particularly since numerous states support the federal regulation and believe that it protects their vital interests.

POINT II

PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. The Final Rule Was a Logical Outgrowth of the Proposed Rule

Under the Administrative Procedure Act, agencies "may issue rules that do not exactly coincide with the proposed rule as long as the final rule is the 'logical outgrowth' of the proposed rule." *Fertilizer Inst.*

v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991). "Under the 'logical outgrowth' test . . ., the key question is whether commenters 'should have anticipated' that EPA might" issue the final rule it did. *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007).

State Petitioners claim that the final Rule is not a "logical outgrowth" because it includes distance-based limitations in its definitions of "adjacent waters" and in its case-by-case procedures. But Petitioners were on notice that distance-based limitations were contemplated. The preamble to the proposed rule sought public input on the proposed definition of "adjacent waters," and requested comments on "other reasonable options for providing clarity," including those "establishing specific geographic limits" such as "distance limitations." 79 Fed. Reg. at 22,208/1, 22,209/1-2; *see* 80 Fed. Reg. at 37,088-37,091 (discussing public comments on distance-based limitations). It should be no surprise that when the Agencies solicited comments on how to achieve "greater clarity, certainty, and predictability" in case-by-case determinations, distance-based limitations were among the logical options. *Id.* at 22,214; *see also* 80 Fed. Reg. at 37,057 (noting that many commenters and stakeholders "urged EPA to improve upon the 2014

proposal, by providing more bright line boundaries"). The Rule is a logical outgrowth of the proposed rule.

B. The Agencies Were Not Arbitrary and Capricious in Setting Distance Limitations

The distance limitations for the Act's reach are not arbitrary and capricious. As Chief Justice Roberts observed, the Agencies are to be "afforded generous leeway by the courts in interpreting the statute . . . [including] plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Rapanos*, 547 U.S. at 758. The record reflects the importance of distance. *See* Technical Support Document at 112 ("Spatial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters."); *see also* 80 Fed. Reg. at 37,085-86 (discussing scientific basis for including waters located within distance limitations). And "bright-line tests are a fact of regulatory life," necessary for administrative practicality. *Macon Cty. Samaritan Mem. Hosp. v. Shalala*, 7 F.3d 762,

768-69 (8th Cir. 1993). It would be inappropriate to second-guess these expert and highly technical judgments at this early juncture.

C. The Rule Is Consistent With Justice Kennedy's Opinion In *Rapanos*

Tributaries. The Rule does not run afoul of Justice Kennedy's opinion by including "tributaries" within the "waters of the United States." Justice Kennedy made clear that even minor tributaries can reasonably lie within the Act's jurisdiction. He observed that the standard for tributaries implemented by the Agencies at the time of *Rapanos* required the presence of an ordinary high-water mark, and stated that this standard "presumably provides a rough measure of the volume and regularity of flow," and therefore "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters." 547 U.S. at 781.

Significantly, the Rule takes a more exacting approach to jurisdictional tributaries than that approved by Justice Kennedy. The Rule defines a tributary as a water that contributes flow to a traditional navigable water and possesses "the physical indicators of a bed and banks *and* an ordinary high water mark." 33 C.F.R. § 328.3(c)(3)

(emphasis added). Thus, in at least this respect, the Rule's requirement that a tributary have a bed and bank, in addition to an ordinary high water mark, tends to *reduce* jurisdiction over such waters when compared to agency practice at the time of *Rapanos*. *Compare* Rule, 33 C.F.R. § 328.3(c)(3)(iii) (requiring a bed and bank) *with* Army Corps, Regulatory Guidance Ltr. No. 05-05, Dec. 7, 2005 at 3 (an ordinary high-water mark can be demonstrated by evidence other than the presence of bed and banks).

State Petitioners wrongly attribute to Justice Kennedy the view "that the CWA cannot cover all 'continuously flowing stream[s] (however small)' or waters sending only the merest 'trickle[s]' into navigable waters." (Mot. at 13.) The quoted language is from an early portion of Justice Kennedy's opinion that was not addressing what tributaries the "CWA cannot cover," but instead pointing out an internal inconsistency in the plurality opinion's views on wetlands. Justice Kennedy observed that the plurality's requirement of a continuous surface-water connection would "permit applications of the statute [to remote wetlands connected with a continuously flowing stream (however small)]," even though such wetlands could be "as far

from traditional federal authority as are the waters [the plurality] deems beyond the statute's reach." 547 U.S. at 776-77. Similarly, the language about the "merest trickle" also points to inconsistency in the plurality opinion. *Id.* at 769. But neither quote endorses any limitation on the Act's applicability to tributaries; Justice Kennedy was merely setting the stage for his own significant-nexus test.

Adjacent Waters. State Petitioners are also wrong in claiming that the Rule's coverage of adjacent waters (typically wetlands) fails Justice Kennedy's test. Justice Kennedy opined that the Act could not apply to all wetlands adjacent to certain tributaries, such as "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* at 782. But the Rule excludes many of the adjacent wetlands that were of concern to Justice Kennedy. It does so by reducing the number of "tributaries" deemed covered, thus reducing coverage of wetlands adjacent to them. *See* 80 Fed. Reg. at 37,058 col.3. To be a tributary, there now must be evidence showing a bed and bank as well as an ordinary high-water mark. *Id.* at 37,058. As determined by the Agencies based on an extensive scientific record, "sufficient volume, duration, and frequency of flow are required

to create a bed and banks and ordinary high water mark." 80 Fed. Reg. at 37,066. Thus, under the Rule's definition, tributaries do not carry "only minor water volumes," as the Petitioner States argue, and jurisdiction over wetlands adjacent to them does not fail Justice Kennedy's test.

Similarly, the Rule addresses Justice Kennedy's concerns by excluding minor and remote waters from its definition of tributaries, thereby excluding wetlands adjacent to them from the Act's reach. Among these exclusions are three categories of "ditches" that have low flow or are remote from navigable-in-fact waters, 33 C.F.R. § 328.3(b)(3)(i), (ii), and (iii); certain stormwater-control features (including "drains"), *id.* § 328.3(b)(6); and limits on certain adjacent waters to those found within specific distances of other waters—which excludes "remote" waters from the Act's reach, *id.* § 328.3(c)(1), (2).

Case-by-Case Coverage. In addition to establishing categories of waters that automatically qualify as waters of the United States, the Rule sets guidelines for making case-by-case determinations. 33 C.F.R. § 328.3(c)(5). These guidelines are on all fours with Justice Kennedy's significant-nexus test. They require an evaluation of nine aquatic

functions to determine whether any function performed by particular waters, whether taken alone or in combination with other functions, contributes significantly to the chemical, physical or biological integrity of nearby downstream waters. *Id.*

Contrary to State Petitioners' assertion, when Justice Kennedy discussed the Act's objectives to "restore and maintain the chemical, physical, and biological integrity' of the Nation's waters, 547 U.S. at 780 (citing 33 U.S.C. § 1251(a)), he never asserted that *each* of these three statutory objectives must be served before a water lies within the Act's protections. Regardless, the nine functions assessed under the Rule generally serve all three objectives. For example, "contribution of flow," cited by State Petitioners, can affect the integrity of downstream waters in multiple respects: physically, by helping to sustain the volume of water in larger waters; chemically, by changing the dissolved-oxygen composition of the water column; and biologically, by supplying downstream waters with organic matter that sustains the food web. *See* 80 Fed. Reg. at 37,068. Moreover, contrary to State Petitioners' claim, the Agencies' discussions of the biological process of "dispersal" in the Rule's preamble and in the Science Report do not contravene *SWANCC*

v. Army Corps, 531 U.S. 159 (2001). The Agencies never endorse jurisdiction under the Act based upon dispersal involving migratory birds living in hydrologically unconnected waters, such as the isolated former sand and gravel pits at issue in *SWANCC*.

D. The Rule Does Not Violate the Constitution

Under *SWANCC* and Justice Kennedy's opinion in *Rapanos*, the application of the Act to waters that lack a significant nexus to traditional navigable waters raises constitutional difficulties and federalism concerns. *Rapanos*, 47 U.S. at 776. But "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). As explained above and in much more detail in the preamble to the Rule, the categories of waters covered by the Rule all bear a significant nexus to traditional navigable waters and that conclusion is supported by voluminous, peer-reviewed scientific evidence.

The Rule does not offend the Tenth Amendment because such federal regulation of private activity to prevent pollution does not create

a cognizable harm to state sovereignty. *See Hodel*, 452 U.S. at 284-93. The Rule does not present constitutional or federalism difficulties because the Agencies applied the significant-nexus test in defining the Act's reach, and because the Rule addresses water pollution affecting more than one State. As Justice Kennedy explained, the Act's policy of respecting the "responsibilities and rights" of states, *see* 33 U.S.C. § 1251(b), encompasses respect for state water-pollution policies favoring federal action to "protect[] downstream States from out-of-state pollution that they cannot themselves regulate." 547 U.S. at 777.

As discussed above, the Rule is important to the Intervenor States because it protects their waters from interstate pollution, facilitates implementation of their own water programs, and protects their related economic interests. Accordingly, the Rule actually furthers the Tenth Amendment and federalism by protecting the interests of states. *See United States v. Wash. Suburban San. Comm'n*, 654 F.2d 802, 807 (D.C. Cir. 1981) (Tenth Amendment challenge to Act does not lie where it would cause injury to states).

CONCLUSION

The motion for a nationwide stay of the Clean Water Rule pending this Court's review should be denied.

Dated: Albany, New York
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Respectfully submitted,

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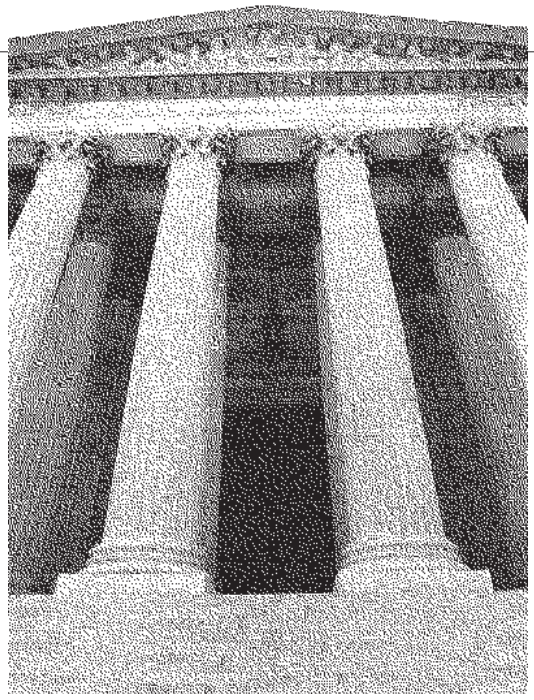


THE FORUM

Which Environmental Statute Is the Most Important and Effective?

It has been 45 years since the first modern environmental statutes were beginning to be passed, a period in which the U.S. economy grew by leaps and bounds, but emissions and discharges of most kinds actually dropped. The laws were directed at the most important pollutants in different media and different economic settings. The Clean Air Act was aimed primarily at criteria pollutants and now is being wielded against the emissions that cause climate change. The Clean Water Act actually was passed over a presidential veto, showing strong bipartisan support. Although it didn't achieve its goals of zero discharge, our lakes and streams are no longer a sewer, and sewers are no longer a preferred conduit of pollutants into our waterways.

The Endangered Species Act has brought eagles and wolves and grizzly bears back from the brink of extinction, and in the snail darter case and subsequent lawsuits showed that it is one of our most effective laws in land use regulation. Our hazardous materials laws, starting with the Comprehensive Environmental Response, Compensation, and Liability Act, not only cleaned up some of our worst waste sites, its strict liability provisions no doubt produced a marked decrease in industry's jetisoning wastes into inappropriate landfills and dumps. The Resource Conservation and Recovery Act manages hazardous materials in commerce, ensuring that businesses handle chemicals appropriately while using and storing them.

Meanwhile, the National Environmental Policy Act set the country on a course to preserve the biosphere as a matter of national will and put in place environmental impact assessment, wherein government has to assess the probable effect of its actions and invite citizen involvement. Finally, although not an environmental law per se, the Administrative Procedure Act manages the whole package of environmental laws and their implementation.

Which is the most important? We asked six of the foremost experts in the country to answer that question. After viewing their answers, readers will no doubt answer that they all are important, and be thankful that our lawmakers and policymakers, our businesses and citizens, and of course the environment itself, all benefit from this suite of statutes.

"CERCLA introduced the concept of joint and several liability to the daily lexicon of environmental practitioners"

Elliott P. Laws
Partner
Crowell & Moring, LLP

"The APA's procedural protections are critical to the sound implementation of our other environmental laws"

Amanda C. Leiter
Associate Professor of Law
American University

"No other federal statute besides the ESA deals so intimately with ecological life histories and, albeit indirectly, ecosystems"

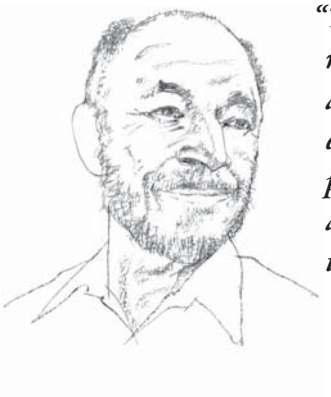
Zygmunt Plater
Director
Boston College Land and Environmental Law Program

"Congress set audacious goals in the CWA: To restore and maintain the chemical, physical, and biological integrity of the nation's waters"

Kathy Robb
Partner
Hunton & Williams

"The National Environmental Policy Act has changed the way we think, a truly magnificent achievement"

Nicholas C. Yost
Partner
Denton US LLP



"The CAA's emission reductions have been achieved during four decades when the U.S. population doubled and economic activity tripled"

Bob Yuhnke
Attorney (retired)
Environmental Defense Fund

Cleaner Waters — but a Murky, Uncertain Future

KATHY ROBB

At one level, the bundle commonly referred to as the Clean Water Act — a statute first passed in 1972 and last amended in 1987, with antecedents as far back as the Rivers and Harbors Act of 1899 — has enjoyed uncommon success.

In assessing that success, it is well to remember that in the beginning the rivers were on fire. Wood debris and an oily glaze common in the Cuyahoga River first burned in 1868 and in 13 subsequent fires. In 1952, ships and a waterfront building were destroyed by fire on the Cuyahoga. Iconic photos from that year published on the cover of *Life* magazine at the time of a 1969 fire horrified the nation, galvanizing political support for passage of the CWA three years later. But the Cuyahoga was not particularly unusual. The Chicago, Buffalo, and Rouge rivers also repeatedly caught fire. Visible filth was a mainstay on the Potomac and the Mississippi.

The law was not enacted without challenge. The initially named Federal Water Pollution Control Act Amendments of 1972 was vetoed by President Nixon, citing concern for "spiraling prices and increasingly onerous taxes," particularly the "staggering, budget-wrecking $24 billion" provided in the bill. Yet Congress immediately overrode the veto by 52 to 12 in the Senate and 247 to 23 in the House, with members of both parties casting votes on each side, in a bipartisan atmosphere we now can only marvel at.

Congress set audacious goals in 1972: "To restore and maintain the chemical, physical, and biological integrity of the nation's waters," to make waters fishable and swimmable by 1983, and to eliminate the discharge of pollutants by 1985. Unsurprisingly, these goals were not met. But by 1998, the United States had doubled the waters clean enough for fishing and swimming; more than doubled the number of people served by modern sewage treatment plants, to 173 million; and drastically reduced wetlands losses.

By 2004, the date of the most recent Environmental Protection Agency "Water Quality Inventory Report to Congress," more than 60 percent of the nation's waters met the CWA goals; in 1972, less than a third did. The statute has resulted in a serious reduction in industrial and sewage waste discharges. There is no question that the country's overall water quality has improved significantly over the past four decades as a result of the act.

Still, tensions inherent in the CWA from the beginning remain over 40 years later, centering on cost and jurisdiction. The two are inextricably connected. The statute came with significant federal funds to address its goals. From 1972 to 1995, for example, the federal government spent $61 billion to build or upgrade sewage treatment plants. But the remaining capital needs are staggering. How do we achieve the law's central goals for our waters with what will always be limited resources?

Exacerbating this problem is the debate about just what are jurisdictional waters under the act. After several Supreme Court decisions and multiple proposed and final guidance documents over the years, the debate reached a crescendo with the publication last April of a 100-page proposed rule by EPA and the Army Corps of Engineers addressing "waters of the United States" subject to the CWA. The proposed rule is sure to draw thousands of pages of comments and become the subject of litigation.

While EPA and the Corps protest that the proposed rule is merely a clarification, not a change, for the first time it offers a regulatory definition of "tributary" that includes waterbodies that are natural or man-made; includes all waters adjacent to those defined tributaries; and would require consideration of the jurisdiction of all "other waters" on a case-by-case basis after reviewing whether there is a significant nexus to a tributary. It also includes new definitions for "adjacent" and "significant nexus." While EPA and the Corps state that the proposed rule is grounded in the draft scientific study on the connectivity of waters, the rule was proposed before the Science Advisory Board reviewing the draft connectivity report had the opportunity to finish its analysis. And there is no consideration of the cooperative federalism that was once the touchstone of the act.

What the proposed rule might mean for jurisdiction is more than a new round of scholarly musings in law review articles. If applied, it would broaden the waters subject to CWA jurisdiction (and to other environmental laws as well), encourage jurisdiction determinations through costly litigation in citizen suits, consume local, state, federal, and private resources, and ultimately limit the day-to-day activities of thousands of businesses and individuals. It will further affect cost without moving us any closer to figuring out how to prioritize and protect the waters that matter to us or further the goals of the act — a potentially sad epilogue for the statute.

The Clean Water Act has resulted in cleaner rivers, lakes, and streams, providing boating, swimming, and fishing, and wildlife and health protection. Tens of billions of pounds of sewage, chemicals, and debris have been kept out of our waters. Scientific and technological advances have been encouraged. It has provided critical infrastructure funding. The rivers are no longer catching fire. New York City has half a dozen public swimming events annually in its harbor. How we resolve the tension of prioritizing and protecting waters going forward with scarce resources will determine the ultimate success of the statute.

Kathy Robb is a partner at Hunton & Williams representing water districts, manufacturers, energy companies, and financial institutions in environmental litigation and transactions.