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The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

The Honorable R.D. James
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U.S. Department of the Army
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[Submitted via regulations.gov](https://www.regulations.gov)

Re: Comments of the States of West Virginia, Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Utah, on the proposed rule entitled *Revised Definition of "Waters of the United States,"* 84 Fed. Reg. 4154 (Feb. 14, 2019) (Docket Nos. EPA-HQ-OW-2018-0149; FRL-9988-15-OW).

Dear Administrator Wheeler and Mr. Assistant Secretary R.D. James:

In response to the notice of proposed rulemaking issued by the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively "the Agencies"), the undersigned States write to express our strong support for repealing the rule entitled "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule" or "Rule"). Moreover, the statutory and constitutional objections the States have with the 2015 Rule are corrected by the proposed rule, "Revised Definition of 'Waters of the United States,'" 84 Fed. Reg. 4154 (Feb. 14, 2019) ("Proposed Rule"). Accordingly the States support adoption of the Proposed Rule.

BACKGROUND

I. Statutory Framework

The Clean Water Act of 1972 (“CWA”) granted the Agencies regulatory authority over “navigable waters,” defined as “waters of the United States.” 33 U.S.C. §§ 1344, 1362(7). In order to discharge a covered “pollutant” into these protected waters, a farmer, developer, homeowner, or landowner must first obtain a permit from the EPA or the Corps. 33 U.S.C. §§ 1311(a), 1344, 1362(12). Obtaining a permit can take years, and often costs tens or hundreds of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344; *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (citing 33 U.S.C. §§ 1362(12), 1362(6)). And unauthorized discharges can subject an individual to fines and other civil or criminal penalties. 33 U.S.C. §§ 1311(a), (f), 1319, 1365.

The CWA was purposefully built on a cooperative federalism framework. Congress instructed the Agencies to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b). As the entities most directly attuned to the effects of pollution on state waters, all States have local environmental laws designed to protect these critical resources.¹ The majority of States have also assumed authority to administer the CWA’s permitting regimes, *see NPDES Program Authorizations, National Pollutant Discharge Elimination System (NPDES)*, EPA.gov, <https://www.epa.gov/npdes/npdes-program-authorizations>, and all States issue water quality certifications for every federal permit the federal government issues within their borders, *see* 33 U.S.C. § 1341(a). Properly understood, the CWA thus works in tandem with state and local environmental regulations. Because the statute assumes that federal regulators will stay within their appropriate lane, States’ authority and responsibilities in this area make an overly expansive definition of “waters of the United States” unnecessary to protect many of the nation’s intrastate water resources.

The Supreme Court has repeatedly recognized that the statutory definition of “waters of the United States” is cabined. Long prior to the CWA, the Court “had interpreted the phrase ‘navigable waters of the United States’ in the [CWA’s] predecessor statutes to refer to interstate waters that are ‘navigable in fact’ or readily susceptible of being rendered so.” *Rapanos*, 547 U.S. at 723 (plurality op.) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). In recent years, the Court has twice rejected assertions of broad federal authority as inconsistent with the CWA:

¹ *See, e.g.*, Ark. Code Ann. §§ 8-4-101, *et seq.*; Ky. Rev. Stat. §§ 224.70-100, *et seq.*; Mo. Rev. Stat. §§ 644.006, *et seq.*; Mont. Code Ann. §§ 75-5-101, *et seq.*; N.D. Cent. Code §§ 61-28-01, *et seq.*; N.M. Stat. Ann. §§ 74-6-4, *et seq.*; Tex. Water Code §§ 26.001, *et seq.*; W. Va. Code §§ 22-26-3, 22-1-1 to -15.

First, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), the Court rejected the Corps’ asserted jurisdiction over waters “[w]hich are or would be used as habitat” by migratory birds—including seasonal ponds and other “nonnavigable, isolated, intrastate waters.” *Id.* at 164. The Court explained that this expansive interpretation was at “the outer limits of Congress’ power” and thus could not be upheld absent clear congressional authorization. *Id.* Without that authorization, this jurisdictional expansion would impermissibly “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* at 173.

Second, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court rejected an interpretation that would have given the Corps authority over intrastate wetlands with no significant connection to actually navigable waters. Justice Scalia’s plurality opinion explained that the term “waters of the United States” encompassed only “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *id.* at 739 (plurality op.) (quoting Webster’s New International Dictionary 2882 (2d ed. 1954)), and “wetlands with a continuous surface connection to” those waters, *id.* at 742. In contrast, “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage rainfall” are outside the CWA’s jurisdiction. *Id.* at 739.

Justice Kennedy wrote separately in *Rapanos*, concurring in the judgment. In his view, the term “waters of the United States” includes only “waters that are or were navigable in fact or that could reasonably be so made,” or waters with a “significant nexus” to such bodies. *Rapanos*, 547 U.S. at 759. The cornerstone of Justice Kennedy’s “significant nexus” test is not a direct physical connection between waters, as required by the plurality opinion, but rather “assurance” that the nonnavigable water “significantly affects the chemical, physical, and biological” integrity of navigable waters. *Id.* at 779-81 (Kennedy, J., concurring in the judgment).

II. Procedural Background

In June 2015, the Agencies issued the final 2015 Rule. 80 Fed. Reg. at 37,054 (June 29, 2015). This Rule advanced a novel and sweeping view of CWA jurisdiction that would include even usually dry channels that occasionally carry “[t]he merest trickle” into navigable waters, as well as “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *Rapanos*, 547 U.S. at 769, 781 (Kennedy, J., concurring in the judgment).

The Rule began by categorizing as primary waters “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce,” and “[a]ll interstate waters, including interstate wetlands.” 33 C.F.R. § 328.3(a)(1)-(3). It then asserted jurisdiction over three additional categories of water with increasingly attenuated connections to primary waters: (1) “[a]ll tributaries,” *id.* § 328.3(a)(5), defined as any “water that contributes flow, either directly or through another water” to an interstate water that is “characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark,” *id.* § 328.3(c)(3); (2) all waters “adjacent” to interstate waters and their tributaries, *id.* § 328.3(c)(1);

and (3) any water, on a case-by-case basis, that is at least partially within the 100-year floodplain of a primary water and at least partially within 4,000 feet of the high tide line or ordinary high water mark of a primary water or tributary where the Agency asserts a significant nexus with a primary water, *id.* § 328.3(a)(8).

Many of the undersigned States, among others, challenged the 2015 Rule as contrary to the CWA, the Administrative Procedures Act, and the Constitution.² Reflecting the strength of these challenges, the 2015 Rule has been stayed by multiple federal courts. One day before the Rule’s effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined implementation of the Rule in thirteen plaintiff-States pending judicial review of the Rule. *North Dakota v. U.S. Evtl. Prot. Agency*, 127 F. Supp. 3d 1047 (D. N.D. 2015). Soon after, the Sixth Circuit stayed implementation of the Rule nationwide, finding that it was likely unlawful. *In re EPA*, 803 F.3d 804 (6th Cir. 2015).³

While this litigation remained ongoing, President Trump issued an Executive Order in early 2017 instructing the Agencies to review the 2015 Rule and propose a rule to revise or rescind it. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Feb. 28, 2017). Specifically, the Order instructs the Agencies to consider interpreting the term “navigable waters” in 33 U.S.C. § 1362(7) consistent with Justice Scalia’s plurality opinion in *Rapanos*. The Agencies developed a two-step approach toward implementing the Executive Order’s directive: First, rescinding the 2015 Rule and re-codifying the pre-existing rules, and then in a separate proceeding—this proceeding—issuing a new rule defining “waters of the United States” consistent with the CWA and its underlying federalism principles. The Agencies issued a notice of Proposed Rulemaking addressing the first point on July 27, 2017. 82 Fed. Reg. 34,899. West Virginia and many of the other undersigned States submitted comments in support of the Proposed Rule on September 27, 2017.

Shortly after the Supreme Court’s January 2018 decision regarding courts’ jurisdiction to conduct direct review of the 2015 Rule—which, in turn, led to dissolution of the Sixth Circuit’s nationwide stay—the Agencies issued a separate final rule delaying the applicability date of the 2015 Rule by two years. 83 Fed. Reg. 5200 (Feb. 6, 2018). Many of the undersigned States had also filed comments in support of this rule as a stop-gap measure to provide regulatory certainty

² See *Murray Energy Corp. v. U.S. Evtl. Prot. Agency*, No. 15-3887 (and consolidated cases) (6th Cir.); *North Dakota v. U.S. Evtl. Prot. Agency*, No. 3:15-cv-59 (D. N.D. filed June 29, 2015); *Ohio v. U.S. Army Corps of Eng’rs*, No. 2:15-cv-2467 (S.D. Ohio filed June 29, 2015); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. filed June 29, 2015); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga. filed June 30, 2015); *Oklahoma v. U.S. Evtl. Prot. Agency*, No. 4:15-cv-381 (N.D. Okla. filed July 8, 2015).

³ The Sixth Circuit later determined that it had jurisdiction to consider challenges to the Rule in the first instance under 33 U.S.C. § 1369(b)(1). *In re U.S. Dep’t of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of the U.S.*, 817 F.3d 261 (6th Cir. 2016). That decision, however, was ultimately reversed by the Supreme Court in January 2018. *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 624 (2018).

while the Agencies complete both phases of their review. Some other States and other parties have since challenged the applicability rule in various courts. Meanwhile, litigation has also resumed in several district courts about the legality of the 2015 Rule itself. United States District Courts for the Southern District of Georgia and the Southern District of Texas have entered preliminary injunctions against the 2015 Rule. Coupled with the injunction issued by the United States District Court for the District of North Dakota, implementation of the 2015 Rule is now enjoined in 28 States.

The Agencies issued a supplemental notice of proposed rulemaking on July 12, 2018. 83 Fed. Reg. 32,227 (July 12, 2018). Recognizing the state of regulatory uncertainty that the Agencies' bifurcated proceedings and multiple court challenges nationwide have sparked, the supplemental notice made clear the Agencies' intent to repeal the 2015 Rule in full and replace it with the pre-2015 rules. *Id.* As in their initial comments, West Virginia and other States supported that proposal as a necessary step to roll-back the unlawful 2015 Rule while the Agencies complete their full rulemaking process.

III. The Proposed Rule

The Proposed Rule was published on February 14, 2019. 84 Fed. Reg. 4154 (Feb. 14, 2019). The Proposed Rule continues to implement the directive in the 2017 Executive Order to restore an understanding of "waters of the United States" that is faithful to the CWA's text and spirit of cooperative federalism. When finalized, it would not only rescind the unlawful 2015 Rule, but would also promulgate a new definition of "waters of the United States" that adheres to these principles. Specifically, the Proposed Rule eliminates three of the categories of waters that have been at the center of litigation against the 2015 Rule: "case-by-case" waters, "interstate waters," and "adjacent" waters. *Id.* at 4170. In place of these overbroad categories, the Proposed Rule creates more specific, recognizable categories covering "wetlands" and "lakes and ponds," and there only insofar as they are directly connected to a traditional jurisdictional water. *Id.* Similarly, the Proposed Rule narrows the classification of "tributaries" that are subject to CWA jurisdiction. Under the 2015 Rule, tributaries are covered if they have an "ephemeral" connection to another jurisdictional water—that is, if they were connected following specific, isolated precipitation events. 80 Fed. Reg. at 37,076. The Proposed Rule, by contrast, limits CWA jurisdiction only to tributaries with a "perennial" or "intermittent" connection to jurisdictional waters—or in other words, tributaries that are connected to jurisdictional waters either continuously or at certain predictable times of year. 84 Fed. Reg. at 4173.

DISCUSSION

The 2015 Rule extended the Agencies' authority far beyond what the CWA contemplated and far beyond what the Constitution permits. The Proposed Rule corrects both flaws. To be sure, many of the waters covered by the CWA under the 2015 Rule would still be covered under one of the categories in the Proposed Rule. Yet the Proposed Rule restores reasonable, predictable lines between those waters subject to federal jurisdiction and those properly within the States' regulatory sphere. Because the Proposed Rule is mindful of the limits Congress set in the CWA, including

respect for the “primary responsibility and rights of States” to regulate their own water resources, the undersigned States write in support of the Proposed Rule.

I. The Proposed Rule Corrects The 2015 Rule’s Over-Expansive Approach To CWA Jurisdiction.

A. The plurality opinion in *Rapanos* correctly defines the scope of CWA jurisdiction.

When finalizing the Rule, the Agencies should make clear that they are proceeding in line with the principles in Justice Scalia’s plurality opinion in *Rapanos*, which best comport with the text and purposes of the CWA. The *Rapanos* plurality approach would provide for federal jurisdiction over “only those relatively permanent, standing, or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *Rapanos*, 547 U.S. at 739 (plurality op.) (citation omitted), as well as “wetlands with a continuous surface connection to” those waters, *id.* at 742. As the plurality explained, this approach flows from several wells of statutory construction and thereby best honors the policy choices Congress enshrined in the CWA.

First, and “[m]ost significant of all,” the plurality emphasized that channels that occasionally carry water cannot be jurisdictional waters because the CWA includes these types of channels—pipes, ditches, channels, tunnels, conduits, wells, and the like—in the statutorily separate category of “point sources.” *Rapanos*, 547 U.S. at 735 (plurality op.). The plurality found it telling that the CWA’s definition of “discharge of a pollutant” uses the terms “point sources” and “navigable waters” as distinct categories: Under the statute, a “discharge of a pollutant” consists of “any addition of any pollutant to navigable waters from any point source.” *Id.* (emphasis removed; citation omitted). As the plurality explained, this definition “would make little sense if the two categories”—point source and navigable waters—“were significantly overlapping.” *Id.*

Second, the plurality also focused on Congress’s use of the term “the waters.” By choosing to use both “the definite article (‘the’) and the plural number (‘waters’),” *Rapanos*, 547 U.S. at 732 (plurality op.), Congress “plainly” referred not to “water in general,” but “more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” *id.* at 732 (quoting Webster’s New International Dictionary 2882 (2d ed. 1954)). The point of connection for these categories of waters are that they are all “continuously present, fixed bodies.” *Id.* at 733. The term “the waters” accordingly does not include “ordinarily dry channels” such as “transitory puddles or ephemeral flows of water.” *Id.*

Third, the plurality determined that the CWA’s use of the term “navigable waters” further confirmed that jurisdiction is limited to “relatively permanent bodies of water.” *Rapanos*, 547 U.S. at 734 (plurality op.). That is because the CWA “adopted that traditional term from its predecessor statutes,” and the “traditional understanding” of the term “navigable waters” included only “discrete bodies of water.” *Id.*

Finally, the plurality explained that even if there were ambiguity regarding the meaning of “waters of the United States,” the clear-statement rule a majority of the Court had previously articulated in *SWANCC* would prohibit an expansive interpretation of the term. *Rapanos*, 547 U.S. at 737-38 (plurality op.). Finding an extensive and previously unrecognized view of federal jurisdiction within the CWA would allow the federal government to exercise the “quintessential state and local power” of regulating “immense stretches of intrastate land.” *See id.* at 738. The *Rapanos* plurality explained that, just as in *SWANCC*, it would expect—and require—a clear statement from Congress before blessing such a broad “intrusion into traditional state authority.” *Id.*

Apart from these sound textual moorings, the test from Justice Scalia’s plurality opinion also forwards the CWA’s purpose of “recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources” 33 U.S.C. § 1251(b). This approach preserves the longstanding role of the States as primary regulators of intrastate lands and waters by allowing for federal jurisdiction over only relatively permanent bodies of water. The definition leaves within state control nonnavigable, intrastate water features—those that benefit the most from regulation according to “local policies ‘more sensitive to the diverse needs of a heterogeneous society,’” *Bond v. United States*, 564 U.S. 211, 221 (2011). Those features vary across the country, from dry arroyos in Texas, to ephemeral drainages in Wyoming, to swales in Ohio farmland, to prairie potholes in Nebraska, to thousands of square miles of Alaskan land that is frozen most of the year. The States take very seriously their primary interest in regulating these unique natural resources, and the plurality opinion best affirms the ways that the CWA’s structure and purpose account for local interests and needs.

For all these reasons, the States believe that the plurality opinion in *Rapanos* sets forth the most accurate interpretation of jurisdiction under the CWA. And as discussed further below, the 2015 Rule flouted these principles at every turn. The Proposed Rule would restore statutory coherence and respect for state environmental regulation—indeed, reestablishing clear boundaries between jurisdictional waters and those within the States’ primary sphere would help state agencies better prioritize their resources toward stewarding truly local water resources. The Agencies’ approach in the Proposed Rule illustrates that they have been guided in large part by the *Rapanos* plurality’s reasoning. The Agencies must continue to adhere to these principles in these proceedings, and should make explicit in the final rule that they intend for the rule to be interpreted in this light.

B. The 2015 Rule unlawfully expanded the scope of CWA jurisdiction.

Agencies may exercise only that power Congress has delegated to them. As discussed above, twice in the last fifteen years—in *SWANCC* and *Rapanos*—the Supreme Court has rebuked the Agencies for regulating beyond the boundaries Congress set in the CWA. As the Agencies now recognize, the 2015 Rule defied those limits anew. *See, e.g.*, 84 Fed. Reg. at 4186 (“The agencies believe, however, that this proposal provides better clarity for the regulators and the regulated community alike while adhering to the basic principles articulated in all three Supreme Court cases on point.”); *id.* at 4196 (“This proposed interpretation of the scope of ‘waters of the United States’ would adhere more closely to the limits of Congress’ authority over navigable

waters than the 2015 Rule . . .”). The decision in the Proposed Rule to retreat from the 2015 Rule’s approach is therefore critical—and statutorily required.

As many of the undersigned States have explained in previous comments in related proceedings and in court filings challenging the 2015 Rule⁴, the 2015 Rule far exceeds the *Rapanos* plurality’s understanding of CWA jurisdiction. It swept into the definition isolated, intrastate tributaries; waters geographically disconnected from traditional navigable waters (despite using misleading “adjacent” terminology); and other waters lacking any surface connection to navigable waters but nonetheless covered by application of a flexible, case-by-case analysis. Indeed, under this framework the 2015 Rule purported to regulate many of the *same waters* that the Court has already held fall outside the CWA’s scope. The case-by-case waters category, for example, encompasses isolated local ponds episodically used by wildlife—the very same theory that the Supreme Court rejected in *SWANCC*. Because the 2015 Rule cannot be squared with the statutory text and Supreme Court precedent, the undersigned States thus strongly support repeal.

Further, the Proposed Rule is correct to jettison the 2015 Rule because it could not stand even under the reasoning of Justice Kennedy’s concurrence in *Rapanos*—which was the Agencies’ purported basis for the 2015 Rule in the first place. Arguably more permissive than the plurality’s approach, Justice Kennedy’s concurrence looked to whether waters have a “significant nexus” to traditional navigable waters. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Even under this approach, however, the CWA would not cover waters with a merely “speculative or insubstantial” nexus to navigable waters. *Id.* at 776. Justice Kennedy also rejected a definition that would have asserted jurisdiction over all “wetlands (however remote),” or all “continuously flowing stream[s] (however small).” *Id.* Yet the 2015 Rule purports to do just that—and more. The Rule’s “tributaries” category, for example, includes usually *dry* channels that, at most, carry the “[t]he merest trickle[s]” into navigable waters on some occasions. *Cf. id.* at 769; 80 Fed. Reg. 37,076 (including “ephemeral” tributaries within “waters of the United States.”). The “adjacent” category similarly covers waters simply because they are within 4,000 feet or the “100-year floodplain” of a navigable water, even though Justice Kennedy specifically disclaimed a rule that would cover “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it.” *Cf. Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment); 80 Fed. Reg. at 37,059. This category also asserts jurisdiction over land features that might link to navigable waters, if at all, only during once-in-a-century rainstorms. 80 Fed. Reg. at 37,069. There is no plausible argument that these lands bear a “significant nexus” to waters of the United States.

Finally, even if existing Supreme Court precedent interpreting the CWA did not bar the 2015 Rule, repeal would also be necessary because there is no clear congressional authorization for the broad and novel assertion of authority it represents. Congress must “speak clearly if it

⁴ See, e.g., Patrick Morrissey, et al. to Hon. Scott Pruitt and Hon. Douglas Lamont, Sept. 27, 2017, Docket ID EPA-HQ-OW-2017-0203-13716, available at <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-13716>; *North Dakota et al. v. U.S. Envtl. Prot. Agency*, Pl. States’ Mem. Supp. Mot. Summ. J. (ECF No. 212), No. 3:15-cv-59 (D. N.D. Jun. 1, 2018); *State of Georgia, et al. v. Wheeler*, Mot. Summ. J. (ECF No. 203), No. 2:15-cv-79 (S.D. Ga. Aug. 31, 2018).

wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Utility Air Reg. Grp. v. Evtl. Prot. Agency*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). No such statement exists in the CWA. This means that even if it were *possible* to construe the CWA’s text in a manner that would allow for the 2015 Rule or a similar approach, such an interpretation could not stand because it is not *clear* that Congress intended for this result. Critically, the *SWANCC* rule was also animated by constitutional concerns. There, the assertion of federal authority was unauthorized, in part, because it would have invited serious constitutional concerns. *See* 531 U.S. at 173. These concerns apply with much greater urgency to the 2015 Rule, which covers not only the same waters at issue in *SWANCC*, but innumerable other local land and water features as well. Because the 2015 Rule hits against or exceeds constitutional limits, as discussed further in Part II below, the Agencies would require a clear directive from Congress before regulating so expansively.

C. The Proposed Rule’s definition of “waters of the United States” comports with the statutory limits of the CWA.

Unlike the 2015 Rule, the Proposed Rule properly cabins the scope of jurisdictional waters within the limits of the CWA. The Proposed Rule starts from the common-sense position that “waters of the United States” are those “within the ordinary meaning of the term,” including “oceans, rivers, streams, lakes, ponds, and wetlands.” 84 Fed. Reg. at 4155. Perhaps more importantly, it also recognizes that “not all waters are ‘waters of the United States.’” *Id.*

The Proposed Rule emphasizes “naturally occurring surface water channel[s]” and “perennial or intermittent flow” in its new standard. 84 Fed. Reg. at 4155. It also looks to a “typical year” as the benchmark for identifying covered waters, not whether atypical rains might, on rare occasions, flood what is ordinarily dry ground. *Id.* Where the waters in question are not navigable-in-fact—that is, are not part of the traditional categories of navigable waters, like oceans and rivers—the Proposed Rule requires a demonstrable, physical connection to primary jurisdictional waters as an indispensable predicate to CWA jurisdiction. Some wetlands, for instance, may be regulated under the CWA, but only insofar as they are “adjacent” to other jurisdictional waters—and unlike in the 2015 Rule, “adjacent” is defined to require a “direct hydrological surface connection,” or that the wetlands actually “touch” jurisdictional waters “at a point or side.” 84 Fed. Reg. at 4184. Similarly, lakes and ponds that are not navigable-in-fact are only considered jurisdictional waters if they have a “direct hydrological connection” to another jurisdictional water. *Id.* at 4182. In both categories, a “direct hydrological connection” exists where a water feature is “indistinguishable from and inseparably bound up in” jurisdictional waters at some point “within a typical year.” *Id.* at 4188. Similarly, “tributaries” are only treated as jurisdictional where routine and predictable changes merge the tributary with another jurisdictional water. 84 Fed. Reg. at 4173.

The Proposed Rule also draws appropriate and clear limits on its classifications of “waters of the United States” by excluding certain categories of waters. For example, the Proposed Rule expressly excludes from jurisdiction “a wetland [that is] connected to the navigable water by flooding, on average, once every 100 years.” 84 Fed. Reg. at 4188. “Physically remote isolated wetlands” are also excluded, *id.*, along with “[l]akes and ponds that contribute flow to traditional

navigable waters through ephemeral flow,” *id.* at 4182. The Proposed Rule expressly contrasts its classifications with “ephemeral geographic features that are dry almost all of the year, as well as nonnavigable, isolated waters as the 2015 Rule would regulate. *Id.* at 4196.

These hallmarks of the Proposed Rule—a focus on waters that would naturally be viewed as navigable and others only where they actually touch those waters, all viewed through the lens of an ordinary year—directly incorporate the teachings of the *Rapanos* plurality. Indeed, by requiring a “direct hydrological surface connection” as a predicate for jurisdiction and putting force behind the definition of that term, the Proposed Rule succinctly incorporates Justice Scalia’s “continuous surface connection” standard. *Rapanos*, 547 U.S. at 741-42 (plurality op.). This approach is faithful to the statutory text, and carries the additional benefit of providing greater predictability to regulated parties and the State agencies that implement the CWA regime. Justice Kennedy’s “significant nexus” test, for example, invites myriad questions about the meaning of “significant,” and under the 2015 Rule it can almost be said that land or waters should be assumed to be jurisdictional unless demonstrated otherwise. By contrast, while the Proposed Rule notes that its framework would sometimes extend CWA jurisdiction where Justice Kennedy’s “significant nexus” test would not—the Proposed Rule, for example, does not impose any volume threshold before a hydrological connection to jurisdictional waters would bring a water feature under the ambit of the CWA, 84 Fed. Reg. at 4175—its focus on actual connection to traditional navigable waters is easy to identify and enforce.

II. The Proposed Rule Corrects Constitutional Defects In The 2015 Rule.

The undersigned States also support the Proposed Rule because it avoids the serious constitutional concerns implicit in the 2015 Rule’s approach to CWA jurisdiction.

A. Unlike the 2015 Rule, the Proposed Rule respects States’ traditional regulatory power over intrastate lands and waters.

The 2015 Rule’s principal failing is that it unconstitutionally encroached on States’ rights to regulate purely intrastate waters. A federal rule violates States’ Tenth Amendment powers when it addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair States’ ability to structure integral operations in areas of traditional State functions. *Hodel v. Va. Surface Mining & Reclamation Ass’n Inc.*, 452 U.S. 264, 286-87 (1981). State authority to regulate local lands and waters is a core sovereign interest; indeed, it “is perhaps the quintessential state activity.” *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982). It therefore follows that regulating and protecting purely *intrastate* waters is unquestionably an important element of state sovereignty. *Tarrant Reg’l Water Dist. v. Hermann*, 569 U.S. 614, 632 (2013) (citing *United States v. Alaska*, 521 U.S. 1, 5 (1997)). Indeed, even when States and federal agencies share jurisdiction, States often take the frontline role in environmental enforcement, pollution mitigation, and disaster cleanup.

The 2015 Rule purports to usurp this traditional state power. By its terms it would cover almost every wet area in the entire United States: As the Agencies acknowledged last year, “the vast majority of the nation’s water features are located within 4,000 feet of a covered tributary,

traditional navigable water, interstate water, or territorial sea,” and thus could be subject to CWA jurisdiction under the 2015 Rule. 83 Fed. Reg. 32,227, 32,248 (July 12, 2018) (citation omitted). The 100-year floodplain, another aspect of the 2015 Rule, encompasses an even larger area. Indeed, the 2015 Rule’s purported application to local *lands* that are dry save for minute trickles of water or once-in-a-generation rainfalls underscores the severity of that rule’s intrusion into traditional realms of state authority. By displacing state control of land use to this degree, the Agencies would have become a “de facto” federal “zoning board.” *Rapanos*, 547 U.S. at 738 (plurality op.). The Tenth Amendment does not allow such a result.

The Proposed Rule restores the proper constitutional balance by limiting the category of waters of the United States to those actually and directly connected to navigable waters. Re-emphasizing States’ traditional power to regulate intrastate waters also respects Congress’s expressly codified purpose in the CWA to “recognize, preserve, and protect the primary responsibility and rights of States to prevent, reduce, and eliminate pollution . . . of land and water resources.” 33 U.S.C. § 1251(b). After all, by limiting the CWA’s scope to “waters of the United States,” Congress created a dichotomy between these navigable bodies of water and more local waters that the CWA, properly understood, does not touch. This deliberate delineation of responsibility between sovereigns is a classic exercise in cooperative federalism. The States retain their traditional protective roles, and federal regulators are able to rely on experts at the state level to make primary judgments about how best to ensure local water quality and monitor compliance with those requirements.

This constitutional division of powers also makes sense in practice. Authority over intrastate waters is not only an inherent power of the States, but it is one that States have used and continue to use to protect vital water resources. In fact, in many instances these state-law regimes are more protective of intrastate waters than the CWA would be if it applied. And this makes sense: States are more closely connected to the challenges that come with protecting local water resources, and are most deeply invested in their care. States are also better able to tailor regulation and enforcement to their regions’ unique needs, and to adapt quicker to changing conditions that may call for new solutions. There is good reason to think, for instance, that the over 100,000 acres of wetlands in West Virginia should be managed differently than the 960,000 acres of wetlands in Wyoming. Expansive federalism jurisdiction is thus not necessary because state-law regimes are fully capable of protecting local waters. Consider, for example, the following state regimes:

West Virginia: Under West Virginia law, “[i]t is unlawful for any person,” without a permit issued by the State, to “allow sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state.” W. Va. Code § 22-11-8(b)(1). And “waters of the state” is defined to include *all* wetlands and *all* water, on or beneath the earth’s surface; the only exceptions are farm ponds, industrial settling basins and ponds, and water treatment facilities. *Id.* § 22-11-3(23). Every state permit limits the amount of pollutants that may flow into the waters of the State. *Id.* § 22-11-8(b)(4). State regulations also limit the “maximum contaminant levels permitted for groundwater.” *Id.* § 22-12-4(b). These limits are sufficient to “provide protection for” “hydrologically connected . . . surface water and other groundwater.” *Id.* § 22-12-4(c).

Indeed, West Virginia is also committed to protecting wetlands in cooperation with surrounding States. The State entered into a multistate agreement to “[c]ontinually increase the capacity of wetlands to provide water quality habitat benefits throughout the [Chesapeake Bay] watershed.” Chesapeake Bay Watershed Agreement, Goals & Outcomes (2014), *available at* https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf. This agreement seeks to “create or re-establish 85,000 acres of tidal and non-tidal wetlands and enhance the function of an additional 150,000 acres of degraded wetlands by 2025.” *Id.*; *see also* W. Va. Code § 22-11-30 (directing West Virginia officials to enter into an agreement to protect Chesapeake Bay watershed wetlands).

Ohio: Similarly, Ohio regulates all “accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within or border upon [Ohio] or are within its jurisdiction.” Ohio Rev. Code Ann. § 1501.30(6). It is unlawful for any person to “cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state.” *Id.* § 6111.04(A)(1). Ohio also has a detailed program for the management of isolated wetlands: Wetlands are placed into three “levels” and there are different regulations for each level, *see* Ohio Rev. Code Ann. § 6111.022-6111.024, the State maintains a wetland mitigation program, *id.* § 6111.025, and Ohio law requires a permit to dredge and fill wetlands, *see, e.g., id.* § 6111.028.

Pennsylvania: Pennsylvania law protects “any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of [Pennsylvania].” 35 Pa. Stat. § 691.1. It is “unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution.” *Id.* § 691.401. Moreover, even if pollutants are not being actively discharged into Pennsylvania’s waters, the Commonwealth requires a permit if there is a risk that an activity may do so. *Id.* § 691.402. Pennsylvania also protects “isolated wetlands.” *See* 25 Pa. Code § 93.1. A permit is required to build “a dam, water obstruction or encroachment located in, along, across or projecting into” a wetland. *Id.* § 105.18a(a). Permits are granted only if strict requirements are satisfied, *id.* § 105.18a(a), (b), and the Commonwealth enforces wetland replacement criteria mandating that “[t]he wetland . . . shall be replaced at a minimum area ratio of replacement acres to affected acres of 1:1,” *id.* § 105.20a(a)(1).

Wisconsin: Likewise, Wisconsin law regulates all surface water and groundwater in the State. *See* Wisc. Stat. § 281.01(18). The Wisconsin Department of Natural Resources has authority to issue orders for “preventing and abating pollution of the waters of the state,” *id.* § 281.19(1), and has promulgated detailed regulations regarding water quality for surface waters under this power, Wisc. Admin. Code NR ch. 102. Wisconsin also regulates discharge of pollutants from nonpoint sources, prescribing “performance standards for nonpoint sources that are not agricultural facilities or agricultural practices” that are “designed to achieve water quality standards by limiting nonpoint source water pollution.” Wisc. Stat. § 81.16(2). And like the other

States discussed above, Wisconsin has a comprehensive program to protect wetlands. The Department has promulgated detailed regulations setting water quality standard for wetlands, Wisc. Admin. Code NR ch. 103, and it is illegal to “discharge dredged material or fill material into a wetland” without a permit issued by the Department of Natural Resources, Wisc. Stat. § 281.36(3b)(b), and those permits are issued in only a limited set of circumstances, *see id.* § 281.36(3g), (3m).

These four examples are only a sampling of the dozens of state-law regimes protecting intrastate, nonnavigable waters. Together with the many others that space does not permit these comments to address, these laws and regulations exemplify the ideals of cooperative federalism at the heart of the CWA. The Proposed Rule thus cures the 2015 Rule’s Tenth Amendment defects while respecting the important role that States play as protectors of our nation’s water resources.

B. Unlike the 2015 Rule, the Proposed Rule does not exceed Congress’ Commerce Clause authority.

The CWA was enacted pursuant to Congress’s authority under the Commerce Clause, which empowers the federal government to regulate (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce;” and (3) “those activities having a substantial relation to interstate commerce.” *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). The CWA’s protection of “navigable waters” rests upon the first category of Commerce Clause authority. “It has long been settled that Congress has extensive authority over this Nation’s waters under the Commerce Clause” because they are ““channels of interstate commerce”” *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-97 (1824)). Indeed, as the Supreme Court explained in *SWANCC*, the CWA was premised on Congress’s “traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.” 531 U.S. at 172. The Court further emphasized that there is no indication in the CWA that “Congress intended to exert anything more than its commerce power *over navigation*.” *Id.* at 168 n.3 (emphasis added).

The 2015 Rule’s unprecedented view of CWA jurisdiction reached far beyond waters that could feasibly be used for navigation. And while it has long been established that “Congress may exercise its control over the nonnavigable stretches of a river in order to preserve or promote commerce on the navigable portions,” *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (citations omitted), it strains credulity that all the waters—and land features—the 2015 Rule purports to cover are tied to Congress’s primary authority to protect *navigable* waterways. The Proposed Rule, however, reins in the scope of federal jurisdiction. It proposes limiting the definition of “waters of the United States” “to encompass relatively permanent flowing and standing waterbodies” that either (1) are “traditional navigable waters in their own right, or (2) “have a specific connection to traditional navigable waters, as well as wetlands abutting or having a direct hydrologic surface connection to those waters.” 84 Fed. Reg. at 4154, 4170. Confining the CWA to navigable-in-fact waters and those directly connected to them significantly lessens the threat of constitutional encroachment by placing the focus back on true channels of interstate commerce.

C. Unlike the 2015 Rule, the Proposed Rule is not unconstitutionally vague.

Finally, the Proposed Rule corrects two flaws in the 2015 Rule’s definition of “waters of the United States” that rendered the rule unconstitutionally vague under the Due Process Clause.

First, the 2015 Rule “fail[ed] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Chicago v. Morales*, 527 U.S. 41, 56 (1999). As one example, the 2015 Rule’s “tributaries” category covers any “water that contributes flow, either directly or through another water” or through any number of “similarly situated waters to a primary water,” and that is “characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.” 33 C.F.R. § 328.3(c)(3), (5). Reliance on 100-year floodplains, high water marks, and other difficult-to-identify features renders the rule “so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application.” *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007).

Second, the 2015 Rule “authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.” *Morales*, 527 U.S. at 56. “[W]here the legislature fails to provide . . . minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotations omitted). The Supreme Court has concluded that a statute requiring an individual to provide “‘credible and reliable’ identification” was unconstitutionally vague because it failed “to establish standards by which the officers may determine whether the suspect has complied.” *Id.* at 360-61. Similarly, the 2015 Rule allows the Agencies to assert jurisdiction over waters on a case-by-case basis without providing sufficient guidance for making such a determination, making it impossible for ordinary citizens to know when their lands will be swept within the statute’s sweep—and when they might become subject to the CWA’s highly punitive enforcement regime.

The Proposed Rule eliminates both vectors for confusion. Rather than tying jurisdiction to unusual weather events or “ephemeral” hydrological connections, the Proposed Rule encompasses only those supplemental waters for which there can be no doubt as to their connection to jurisdictional waters. The Proposed Rule, for instance, applies only where waters are “indistinguishable from and inseparably bound up in” a water of the United States. 84 Fed. Reg. at 4154, 4183. And rather than relying on 100-year floodplains, the Proposed Rule asks whether this type of direct hydrological connection exists “within a typical year.” *Id.* These are straightforward criteria that limit the potential for arbitrary enforcement and minimize ambiguity for regulated parties. Due process and principles of fair, transparent governance demand no less.

* * *

We urge the Agencies to adopt the Proposed Rule. For the reasons discussed above and those in the States’ prior comments in these and related proceedings, the 2015 Rule is and was unlawful under the Constitution and the CWA. The Proposed Rule re-defines the term “waters of

the United States” in a manner consistent with the CWA, within the parameters of the Constitution, and with full respect for the States’ traditional authority to protect local lands and water resources.

Sincerely,



Patrick Morrisey
West Virginia Attorney General



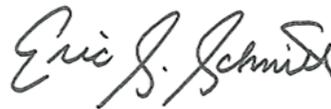
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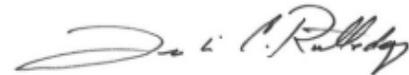
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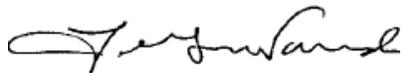
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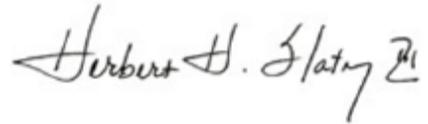
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