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The Honorable Gina McCarthy Administrator U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, D.C. 20460	The Honorable John M. McHugh Secretary of the Army The Pentagon, Room 3E700 Washington, D.C. 20310

By Email to: ow-docket@epa.gov and by United States Postal Service to:

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave. NW.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011-0880

Re: Docket ID No. EPA-HQ-OW-2011-0880

Dear Secretary McHugh and Administrator McCarthy:

We write to formally comment on the Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (USACE) (collectively the "agencies") "Proposed Definition of 'Waters of the United States' Under the Clean Water Act," 40 CFR 230.3.

The proposed rule that will vastly increase federal jurisdiction over property owners by altering the definition of "waters of the United States" under the Clean Water Act (CWA). The agencies purport to increase predictability and consistency through the proposed definition. However, the prospective regulation will have the opposite effect because it: (1) adds vague and easily manipulated terms that will unnecessarily expand agency jurisdiction, (2) sidesteps Supreme Court precedent, (3) is based upon an incomplete scientific report, and (4) relies on a deficient economic analysis. We have concerns with the proposed redefinition and expansion of the scope of federal power under the Clean Water Act (CWA). We strongly suggest that the proposed rule be withdrawn and that your agencies address the legal, economic, and scientific deficiencies of the proposed rule before it is re-issued for public comment.

Interest of Atlantic Legal Foundation

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes current and retired general counsels of some of the nation's largest and most respected corporations, partners in prominent law firms and distinguished legal scholars. In pursuit of its mandate, the Foundation has served as counsel for numerous distinguished scientists, including almost two dozen Nobel Prize winners in Chemistry, Medicine or Physiology and Physics, as *amici* in numerous cases before the Supreme Court involving admissibility of expert scientific evidence, including *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). One of the Foundation's goals is to educate and inform judges and regulators about the correct scientific principles and methods to be applied to issues of causation in litigation and regulation. Atlantic Legal Foundation has had an abiding interest in the regulation of waters and enforcement of the Clean Water Act and other environmental statutes, either as *amicus curiae* or as counsel for *amici curiae* in numerous cases before the United States Supreme Court, including *Koontz v. St. Johns River Water Management District*, 568 U.S. ___, 133 S.Ct. 2586 (2013), *Sackett v. EPA*, 132 S. Ct. 1367 (2012), *Rapanos v. United States*, 547 U.S. 715 (2006).

Summary of Comment

• The proposed rule represents an expansion of federal regulatory authority beyond the language and intent of Congress in the Clean Water Act. Although your agencies assert that the rule is narrow and clarifies CWA jurisdiction, it in fact expands federal authority under the CWA significantly and aggressively and creates unnecessary ambiguity. The proposed rule is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a "jurisdictional wetland."

• The proposed rule would bring vast amounts of land under federal control adding unnecessary and redundant regulatory burdens to areas currently adequately regulated by state and local governments.

• The Supreme Court has twice rejected attempts by regulators to assert authority over "isolated waters" ruling that waters must have a "a continuous surface connection" or "significant nexus" to navigable waters.

• Congress has repeatedly voted not to adopt policies similar to those in the proposed rule. If adopted, the rule would usurp Congressional authority.

• The agencies have no valid scientific basis for adopting the proposed rule.

• The cost-benefit analysis is deeply flawed, employing decades old cost estimates that were not adjusted for inflation, or current economic and market conditions.

• The proposed rule will place undue regulatory burdens and limitations on persons attempting to use their land responsibly and efficiently, would add new regulatory dead weight to the economy and would produce no meaningful gains for the environment, the economy or the nation.

1. Diminished Clarity and Increased Scope

We dispute the agencies' claim that the proposed rule will "narrow" the scope of regulatory jurisdiction.[1] The most problematic of the proposed rule's flaws is the significant expansion of areas defined as "waters of the United States" by effectively removing the word "navigable" from the definition of those waters subject to the CWA.

The proposed rule's definition is based on a legally and scientifically dubious interpretation of the "significant nexus" concept advanced by Justice Kennedy in *Rapanos*. Contrary to the agencies' claims, the rule would place features such as ditches, ephemeral drainages, natural or man-made ponds, seeps, flood plains, and other occasionally or seasonally wet areas under federal jurisdiction.[2] While this proposal is, in a sense, "narrower," because it facially decreases the water bodies subject to case-specific jurisdiction, it extends the agencies' *per se* jurisdiction well beyond current regulations by definitional changes and imprecise wording.

A prime example of the proposed rule's increased ambiguity is how the category of "adjacent wetlands" for *per se* jurisdiction will be replaced with the term "adjacent waters." It will define "adjacent waters" as "wetlands, ponds, lakes and *similar water bodies* that provide *similar functions* which have a *significant nexus* to traditional navigable waters, interstate waters, and the territorial seas." (emphasis added).[3] The highlighted terms are malleable and will accord the agencies greater discretion while providing little clarity for property owners. Similarly, the proposed rule will expand the modifier "adjacent," originally codified as meaning "bordering, contiguous, or neighboring." [4] The proposed rule will broaden this definition by interpreting "neighboring" to include waters with a shallow subsurface hydrologic connection to a traditionally navigable water, within "reasonable proximity."[5] It will be difficult and costly for property owners to ascertain whether an isolated water body on their land contains a shallow subsurface hydrologic connection to a jurisdictional water, much less whether it is within "reasonable proximity."

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[1] *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22189 (proposed Apr. 21, 2014) [hereinafter *Definition*] (to be codified at 33 C.F.R. pt. 328).

[2] EPA's attempt to limit federal jurisdiction by excluding gullies, rills, and swales from the definition of "waters of the United States" is salutary, but more clarity is needed on what these exclusions actually encompass.

[3] *Id.* at 22207.

[4] 33 C.F.R. § 328.3(c) (1993).

[5] *See Definition*, *supra* note 1, at 22207.

Finally, this proposal will dispense with the current framework for determining "other waters"[6] and replace it with an imprecise "significant nexus" analysis. This test will be satisfied when "a water, including wetlands, either alone or in combination with other *similarly situated*[7] waters in the region . . . *significantly* affects the chemical, physical, or biological integrity of a [jurisdictional] water" (emphasis added).[8] The sole limitation articulated is that the significant effect must be "more than speculative or insubstantial,"[9] providing immense regulatory discretion and decreased predictability for the regulated community. Potential difficulties of this type are repeatedly referenced in the comments made by law makers in opposition to the proposed rule.[10]

Rather than providing clarity and making identifying jurisdictional waters "less complicated and more efficient," the proposed rule increases ambiguity and regulatory discretion. For example, the rule heavily relies on undefined or vague concepts such as "riparian areas," "landscape unit," "ordinary high water mark" (– terms that are not found in traditional land use or property rights jurisprudence, but is jargon of recent vintage used by regulators) as determined by the agencies' "best professional judgment." The proposed regulation is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a "jurisdictional wetland." The proposed rule creates more confusion and will lead to more litigation.

2. The *Rapanos* Precedent

Without explanation, the proposed rule unceremoniously, and without sufficient basis, disposes of Justice Scalia's plurality opinion in *Rapanos v. United States* and *Carabell v. United States* ("*Rapanos*") in favor of the nebulous "significant nexus" test found in Justice Kennedy's

[6] The prevailing test for identifying "other waters" is where "the use, degradation, or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3 § (a)(3) (1993).

[7] The agencies propose that *similarly situated* "other waters" are to be examined as to (a) their proximity, (b) how the combined group of waters affects the chemical, physical, and biological aspects of a region, and (c) how functions such as habitat, water storage, sediment retention, and pollution sequestration are impacted. *See Definition, supra* note 1, at 22213. Again, this broad term accords the agency substantial discretion, while providing little certainty for individuals and businesses.

[8] *Id.* at 22263.

[9] *Id.*

[10] For example, a Representative from Ohio's eleventh district disagreed with the proposed rule stating "the agency's proposed interpretation of 'significant nexus' is vague enough to allow EPA to assert its jurisdiction over waters not previously regulated rather than to limit its jurisdiction as the agency suggests." Letter from Marcia L. Fudge, Member of Congress for Gina McCarthy (April 23, 2014) (On file with Regulations.gov). Likewise, a State Senator from Alaska also objected to the proposals vague wording due to its capacity to create jurisdiction over much of Alaska: "The proposed rule will treat permafrost as 'water' not as a soil element as it is currently defined. Permafrost is thickest in Arctic Alaska . . . but it is found to some extent beneath nearly 85% of Alaska[n] soils (according to the Alaska Public Lands Information Center). To put 85% of Alaska's land under the jurisdiction of EPA, through use of the CWA would be Eva stating to the people of Alaska and unwarranted." Letter from Cathy Giessel, Alaska State Senator for Donna Downing and Stacey Jensen (June 9,2014) (On file with Regulations.gov).

concurrence.[11] In *Rapanos*, the plurality opinion held that "waters of the United States" covered *relatively permanent, standing or continuously flowing* bodies of water that are connected to traditional navigable waters, in addition to adjacent wetlands with a *continuous surface* connection to such water bodies.[12] The proposed regulation substitutes the amorphous term "adjacent waters" for the phrase "adjacent wetlands." This skews the plurality's definition, giving the agencies vast discretion to interpret what constitutes an "adjacent water." Further, under the proposed rule these adjacent waters may be connected via subsurface hydrologic connections, completely at odds with the plurality's "continuous surface" connection requirement.[13] Not only does the proposed rule contradict the plurality's definition, but the agencies fail to explain why Justice Kennedy's amorphous definition should supplant Justice Scalia's more concrete and certain test. At a minimum, we believe the agencies should be required to give a detailed rationale for this decision.

3. Scientific Basis

The proposed rule is based extensively upon a scientific analysis entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (the "EPA Report"). However, this Report has not yet been properly peer reviewed by the Science Advisory Board (SAB). It is troubling that the proposed rule was promulgated before its foundational scientific basis could be examined. We understand that the SAB is still conducting its Panel review and its panel members have recently expressed their view that the EPA Report will require extensive revisions.[14] Such disregard for peer review, which is an essential safeguard for scientific credibility, calls into question the agencies' adherence to the Administrative Procedure Act and the rule-making process. The science analysis and peer review should always precede a rulemaking especially where the scientific and legal concepts are inextricably linked.

4. Economic Report

The economic report relied upon for the proposed rule states that the revised definition of "waters of the United States" will only increase federal jurisdiction by three (3%) percent.[15] Furthermore, the rulemaking documents assert that the proposed rule will impose few indirect costs

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[11] *Rapanos v. United States* and *Carabell v. United States*, 547 U.S. 715 (2006).

[12] *Id.* at 739, 742.

[13] *See Definition*, *supra* note 1, at 22188.

[14] On June 5, 2014 SAB Panel members reviewed and approved a draft SAB report which "recommends a substantial number of revisions to improve the clarity of the [EPA] Report, better reflect the scientific evidence, provide more quantitative measures, and make the document more useful to decision-makers." SCIENTIFIC ADVISORY BOARD, PANEL MEMBER COMMENTS ON THE DRAFT (6-5-14) SAB REVIEW OF THE DRAFT EPA REPORT *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE* 7 (2014). It further recommends "that EPA clearly set forth the definitions used in the Report to be consistent with the definitions proposed for rulemaking and that any differences between the regulatory and scientific terminology be explained and described in terms of how it may affect interpretation of the conclusions reached." *Id.* at 8.

[15] U.S. ENVIRONMENTAL PROTECTION AGENCY & U.S. ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 12 (2014) (hereafter "Economic Analysis").

and that those costs are easily outweighed by the potential benefits. The evidence supporting these claims is scant. Moreover, the economic report repeatedly stresses that its cost/benefit estimates are incomplete.[16] Nowhere is there any meaningful attempt to capture the potential costs of expanded jurisdiction. Instead, the report mainly focuses on possible benefits including "ecosystem services" such as biodiversity, wildlife habitat, and recreational use.[17] Most of these alleged economic benefits are vague and difficult to monetize, as the report concedes[18], and provide little to justify the potentially unlimited jurisdictional authority the agencies propose. We believe any proposed regulation should be supported by a rigorous cost/benefit analysis. The economic report for the proposed rule is unpersuasive.

a. Increase in Jurisdictional Waters.

The three (3%) percent increase in jurisdictional wetlands estimated by the agencies was based on a limited study; however, that study fails to account for (1) the proposed rule's expanded definition of "waters of the United States" and (2) the agencies' enhanced incentives to increase substantially the number of "other waters."[19]

Jurisdiction was considered for three separate categories of water bodies: streams, wetlands, and "other waters." According to the report, "other waters" are defined as non-navigable waters that lack a direct surface connection to other waterways.[20] During the two-year period none of the "other waters" were considered jurisdictional, as opposed to nearly 100% of streams and wetlands. The economic report's authors then measured 1,000 individual "other waters" during the two-year period and found 17% of them to be jurisdictional.[21]

It is highly probable that the baseline data during the two-year period contains an artificially low number of reported "other waters." Under the original framework no "other waters" could be determined to be jurisdictional; thus, neither the agencies, landowners, nor developers felt compelled

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[16] *See id.* at 2 ("The economic analysis is necessarily based on readily available information and the resulting cost and benefit estimates are *incomplete.*" (emphasis added)); *id.* at 17 ("The Corps also provided an estimate of 43,000 acres of wetland mitigation and 530 miles of stream mitigation period . . . This total may be *incomplete*." (emphasis added)); *see also, id.* at 14 ("The agencies recognize that time and impact avoidance and minimization costs can be significant for some share of permit applicants. However . . . the agencies did not estimate compliance costs for these categories as part of the economic analysis.").

[17] *See id.* at 8.

[18] *See id.* ("The ecosystem services identified . . . have no market values. Some are closely related to market goods, which may facilitate valuation, whereas others are far removed from the end product of market value.").

[19] The baseline data supporting the economic report is derived from a two-year period (2009-2010), which was the most economically depressed since the Great Depression of the 1930s and was characterized by extremely low construction activity. Using period that as a baseline to estimate may skew the incremental acreage impacted by the proposed rule.

[20] *See* Economic Analysis. at 11.

[21] *See id.* at 12.

to seek permit determinations because during the study period this form of "reporting" was deemed unnecessary, and this would explain the relatively low number of "other waters" recorded.[22]

The authors of the report concede that the category of "other waters" may be unrepresentative, stating, "if a significant amount of the [other] waters are not included in the FY 2009-2010 data because of presumed non-jurisdiction on the part of landowners and developers, then the overall percent increase in [other] waters that become jurisdictional would be *somewhat* greater" (emphasis added).[23] This is an understatement. Even a modest increase in the amount of "other waters" recorded would result in a significant expansion of jurisdiction. The small number of reported "other waters" reflects a previously understood standard that property owners could rely upon. The proposed framework for determining jurisdiction may call into question the categorization of almost any body of water and thus landowners will have an incentive to seek permit determinations to reduce the uncertainty regarding the status of their property. The two-fold increase in "other waters" the EPA estimated does not capture the severity of this problem. If the number of "other waters" reported were to approach that of streams and wetlands (which is plausible), expansion of jurisdiction would be considerable.

b. Estimated Costs

Under the proposed rule, estimated permit application costs are projected to impact only 1,332 additional acres. The agencies derived this number by manipulating and excluding several potential sources of permit costs and acreage. First, this estimate is based upon the artificially low projected three (3%) percent increase in jurisdiction. Thus, if the amount of "other waters" rises, the quantity of impacted acreage would likewise increase. Second, the acreage estimation only takes into account section 404 permits, ignoring any permits issued under other sections that may be impacted by the proposed rule, such as section 402.[24] Finally, this estimate only pertains to permits issued for permanent impacts and excludes "ecological restoration and conversion activities, as well as temporary impacts."[25] We believe all of these additional sources or permit jurisdiction should be included in the calculation in order to make an accurate projection of the impact of the proposed rule.

c. Estimated Benefits

To calculate "benefits" of the proposed rule, the report took a benefits transfer approach that combined data from ten different studies that had attempted to "assess the value of waters expected to provide services similar to the waters incrementally protected under the proposed

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[22] Total reported agency records showing jurisdictional status of aquatic resources: 95,476 streams; 38,280 wetlands; 8,209 "other waters." *See id*.

[23] Economic Analysis at 43.

[24] *See id.* at 6 ("Permitting for construction and development stormwater, concentrated animal feeding operations (CAFOs), and pesticide application are three areas of CWA 402 implementation where there may be potential new costs.").

[25] *Id.* at 14.

rule."[26] These studies employed the contingent valuation method (CVM), where "willingness to pay" (WTP) per household was measured via surveys that assessed respondents' stated WTP to preserve certain wetlands.[27] Based on these studies, the agencies determined that the annual WTP for all regional acres ranged from $0.36 to $3.86 depending on the region, with a mean of $2.30.[28] Extrapolating from these figures, the agencies claimed that, "on a per acre basis, benefits vary by region, ranging from approximately $26,000 to $287,000 per year with an overall average of $193,000."[29]

This method is fundamentally flawed. First, the studies relied upon are outdated: the most recent study used was published in 2000 with the rest were published from 1986 to 1999.[30] Next, many in the scientific community find CVM to be both inaccurate and improper for large scale evaluations.[31] These studies often suffer from hypothetical response biases which lead to inflated values, strategic questioning, large disparities between willingness to pay and willingness to avoid, and difficulties in verifying data.[32] Finally, even the agencies acknowledge that in general, CVM "elicits 'stated preferences' rather than revealed (or actual) preferences, which is not ideal for quantifying benefits"[33] and that "it is important to recognize up front that there is uncertainty and limitations associated with the [report's] results."[34] Furthermore, the report concedes that WTP may be incomparable between the respondents from the older studies and the individuals who actually use the services in areas potentially affected by increased assertion of jurisdiction.[35] Aggregating household WTP from a few outdated sources to arrive at a nationwide average ignores these

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[26] *Id.* at 21.

[27] *See id.* at 20.

[28] *See id.* at 29.

[29] *Id.*

[30] *See id.*, app. B at 54–58.

[31] *See, e.g.*, Jerry Hausman, *Contingent Valuation: From Dubious to Hopeless*, 26 J. OF ECON. PERSPECT. 43, 44 (2012) ("Responses to contingent valuation surveys for a single environmental issue are typically based on little information, given the limited time involved for each survey respondent. Thus, the results of such surveys are unlikely to be accurate predictors of informed opinion. . . Contingent valuation does not provide a good basis for either informed policymaking or accurate damage assessments in judicial proceedings."); *see also* David W. Eberle & Gregory F. Hayden, *Critique of Contingent Valuation and Travel Cost Methods for Valuing Natural Resources and Ecosystems*, J. ECON. ISSUES 649, 683 (1991) ("The CV [contingent valuation] and TC approaches lack methodological, theoretical, and empirical grounding. Their continued use will mislead valuation attempts and frustrate policy intended to restore a viable environment.").

[32] *See* Hausman, *supra*, at 43.

[33] Economic Analysis at 20.

[34] *Id.* at 21.

[35] *See id.* at 20.

methodological flaws, allowing the agencies to arrive at a convenient number that may bear little resemblance to the actual value of an acre of mitigated land. We believe basing a broad expansion in federal jurisdiction on such a flawed analysis is unsound.

Conclusion

The proposed rule decreases predictability for property owners by obscuring the current definition. It is also supported by both a faulty economic analysis and a scientific report that is yet to be approved.

For the above reasons, we urge that this proposed rule be withdrawn.

Respectfully submitted,

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