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The Honorable Scott Pruitt
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20560

The Honorable Douglass Lamont
Deputy Assistant Secretary of the Army
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310

By electronic communication
Docket Nos. EPA-HQ-OW-2017-0203; FRL-9962-34-OW

Dear Administrator Pruitt and Mr. Lamont,

Thank you very much for the opportunity to comment on your proposed "Recodification of Pre-existing Rules" regarding the "Definition of 'Waters of the United States,'" as published in the Federal Register on July 27, 2017. I have joined with many of my fellow Attorneys General in a multistate response supporting this proposed rule as an orderly interim step on the way to developing a definition that, unlike the ill-fated and overreaching 2015 rule, should be in keeping with statutory and constitutional law. I supplement that letter here to underscore that while maintaining the regulatory status quo is appropriate as a temporary measure, it is essential that your "second step … substantive re-evaluation" arrive expeditiously at a definition that comports with the Clean Water Act's explicit terms and with the Constitution's allocation of federal and State authority in this vital area of traditional State responsibility.

The myriad legal deficiencies of the 2015 WOTUS rule, as marked not only by the court challenges brought by a significant majority of States but also by judicially imposed stays based on the pronounced likelihood of that rule's invalidity, provide more than the "perfectly reasonable basis" for reassessment that accompanies a new Administration's regulatory review. The court orders precluding current implementation of the illegal 2015 rule have left the regulatory status quo in place by natural default, and governments and citizens alike have been operating against that familiar albeit imperfect regulatory backdrop for years. Extending that regime pending appropriate notice-and-comment revision promotes useful continuity during the deliberative period, thereby enhancing some degree of nationwide uniformity and helping to hold litigation burdens and complexities in check as set forth in our multistate letter.

Your proposed interim "recodification" thus advances the same purposes of the Sixth Circuit's nationwide stay that, in effectively reinstating the system you propose to recodify, "temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements" of the 2015 rule and the "substantial" possibility that the courts would recognize its illegality. *Ohio v.*

U.S. Army Corps of Engineers (In re: EPA and DOD Final Rule, 803 F.3d 804, 808 (6th Cir. 2015) (nationwide stay of rule pending judicial review because petitioners have demonstrated substantial possibility of success on the merits). I support that objective and your proposed "step one": in specific answer to your question, I believe as Ohio's chief law officer that "it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of 'waters of the United States'…."

But any long-term administrative definition of federal scope under the Clean Water Act must provide greater predictability as informed by constitutional constraints and by the statutorily mandated precept that the WOTUS definition is circumscribed to describe "navigable" waters. I draw heavily here on and restate earlier communications, and in the interest of brevity I incorporate by reference the entire critique of the 2015 WOTUS rule spelled out in the Complaint that I and the Attorneys General for Michigan and Tennessee filed on June 29, 2015 -- the very day that rule was published -- and in the subsequent Motion for Preliminary Injunction that we filed in that case styled *State of Ohio, et al. v. United States Army Corps of Engineers, et al.*, case number 2:15-cv-02467 (S.D. Ohio), along with the related arguments advanced by roughly thirty States in the Sixth Circuit in connection with our Ohio, Michigan, and Tennessee petition (15-3799) and related cases there, *In re: EPA and DOD Final Rule*, 803 F.3d 804.

As I noted in commenting on the proposed WOTUS definition claimed as precursor to the 2015 rule (and I incorporate here, again, that comment letter of November 13, 2014), the tortured history of federal regulatory actions in this area underscores the need for regulatory reform that advances clear, constitutionally appropriate rules consistent with the language of the Clean Water Act itself to guide the conduct both of government regulators and private property owners. Unfortunately, both the proposed rule on which I was then commenting and the 2015 WOTUS Rule would have extended federal authority well beyond the bounds contemplated by the Act and thereby further muddied the regulatory waters.

In contrast with the 2015 attempted land grab, any appropriate administrative definition of federal reach under the Clean Water Act must be informed by and respect that Act's explicit terms. The Clean Water Act confers federal regulatory jurisdiction over "navigable" waters, which the Act defines as "waters of the United States, including the territorial seas." *See* 33 U.S.C. §§ 1251, 1344, 1362(7). At the same time, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources'." *Solid Waste Ag. of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) *("SWANCC")* (quoting 33 U.S.C. §1251(b) and acknowledging "the States' traditional and primary power over land and water use").

Thus, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172; *see also Rapanos v. United States*, 547 U.S. 715, 778 (2006) (Kennedy, J., concurring) (a "central requirement" of the Act is that "the word 'navigable' in 'navigable waters' be given some importance"); *id*. at 779 (Kennedy, J., concurring) ("the word 'navigable' in the Act must be given some effect"); *cf. id.* at 731 (plurality) (Court has "emphasized" that the statutory "qualifier 'navigable'", while "broader than the traditional [interstate/navigable in fact] understanding" of the term, "is not devoid of significance") (citing *SWANCC*).

I note again that the Act's use of the term "navigable" comes within Title 33's coverage of "Navigation and Navigable Waters." *See, e.g.*, 33 U.S.C. 33 U.S.C. § 1 (regarding regulation by the Secretary of the Army relating to "navigation of the navigable waters of the United States");

33 U.S.C. § 26b (declaring a designated portion of the Calumet River to be "a nonnavigable stream within the meaning of the Constitution and laws of the United States"); 33 U.S.C. § 391 (regarding laws of the United States "made for the protection of persons or property engaged in commerce or navigation"). The Clean Water Act itself comes between chapters on the Ports and Waterways Safety Program, 33 U.S.C. §§ 1221 *et seq.*, and on Ocean Dumping, 33 U.S.C. §§ 1401 *et seq*.

The 2015 rule, however, scorned the Supreme Court's Clean Water Act understanding that "nonnavigable, isolated, intrastate waters" that do not "actually abu[t] on a navigable waterway" do not come with the term "waters of the United States." *SWANCC*, 531 U.S. at 171, 167. Instead, as Ohio has noted with Michigan and Tennessee and with other States, the 2015 rule read "waters of the United States" so broadly that the promulgating agencies found it necessary explicitly to disclaim authority over "puddles" and certain swimming pools (those "constructed in dry land"): But for agency grace, they suggested, the rule by its terms would extend even there. *See* 33 C.F.R. § 328.3(b)(4)(iii), (iv); *see also* 80 Fed. Reg. 37099 (finding it necessary to detail that "[a] puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar participation event").

In breathtaking claims of power, the 2015 rule purported to cover arguable stream beds that usually carry no water at all, and even if not apparent to the naked eye (making them somewhat less "navigable" even than the excluded "puddles"). By defining "adjacent" to include even non-adjacent territories, the rule purported categorically to reach wet spots as far as an arbitrary 1,500 feet from even "ephemeral" stream beds and other land features the rule defined as "tributaries." And it asserted potential coverage up to another arbitrary distance of more than three-quarters of a mile away. In short, the 2015 rule reached far beyond the federal jurisdiction that Congress envisioned and expressed in the Clean Water Act. In entering its stay of the rule, the Sixth Circuit was rightly concerned about "the burden – potentially visited nationwide on governmental bodies, state and federal, as well as private parties – and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines …." *In re EPA*, 803 F.3d at 808; *but cf.* 80 Fed. Reg. 37102 (federal agencies asserting somehow that 2015 WOTUS rule "does not have federalism implications").

As the multistate letter that my colleagues and I submit today further details, the unlawful and now stayed 2015 rule needs to be rescinded.

That 2015 overreach only confirms me in the view expressed in my 2014 comment letter that the Supreme Court plurality in *Rapanos* advanced an understanding of the meaning of "waters of the United States" in keeping with the terms of the Clean Water Act that should guide the agencies in shaping an administrative definition. That definition should be reasonable and workable, and needs to honor "the policy of cooperative federalism that informs the Clean Water Act and must attend the shared responsibility for safeguarding the nation's waters." *In re EPA*, 803 F.3d at 808. *See also Rapanos*, *547* U.S. at 760 (Kennedy, J., concurring) ("The statutory term to be interpreted and applied in the two instant cases is the term 'navigable waters'").

As others also have emphasized, the *Rapanos* plurality found that "waters of the United States" refers "to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.' … On this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' rivers,' 'lakes,' and 'bodies' of water forming geologic features.' … All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily

dry channels through which water occasionally or intermittently flows…" *Id.* at 732-33, *see also id.* at 739. Moreover, the plurality observed, wetlands may be situated actually adjacent to such waters "with a continuous surface connection" and in such a way that "there is no clear demarcation" between them, "making it difficult to determine where the 'water' ends and the 'wetland' begins," *id.* at 742, and the plurality said the Act extends to such water features as well, *see id.* at 735 (citations omitted); *cf. id.* at 768 (Kennedy, J., concurring) ("at least some wetlands fall within the scope of the term 'navigable waters'").

I understand that at this time, you do not seek specific comment on how the precise "step-two" definition of "waters of the United States" should be formulated. Suffice it for now to reiterate that it ought to be possible for the agencies, in setting out a definition to channel their federal administrative scope, to factor the Act's concept of navigability -- presumably by *people*, not insects or waterfowl -- into this context involving relatively permanent standing or flowing bodies of water, forming geologic features, along with other relatively permanent water features having a continuous surface connection with such a navigable body of water. Congress's use of the "qualifiers" "navigable" and "of the United States" both restrain the scope of federal jurisdiction under the Act, and the Supreme Court has not adjudicated the "precise extent" of those bounds (even while observing that past agency understandings of their dominion under the Act went too far). *Rapanos*, 547 U.S. at 731 (plurality); *see also id.* at 735 (plurality; citations omitted) (Court has "repeatedly described the 'navigable waters' covered by the Act as 'open water' and 'open waters'").

I understand, too, that the agencies with this interim rulemaking are not "soliciting comment on the specific content of those longstanding regulations" proposed for recodification as "temporary," placeholder measures. As noted, maintaining the regulatory post-stay status quo does seem entirely sensible pending the necessary "step two" definition in keeping with the *Rapanos* plurality's explication of the law. But the imprecision and undue breadth of that inherited regulatory regime continue to engender controversies, for example, over farmers "plowing soil near a wetland that might not have been wet" (to use one journalist's words describing a now-settled case of alleged regulatory overreach). Greater clarity in conformity with the law is required.

After so much confusion and litigation, the agencies do need without undue delay to consider and advance their own reasoned and legal interpretation further specifying what "navigable" means under the Act and how that term fits with the relatively permanent standing or flowing bodies of water that Justices have said help characterize it. Significantly, and as some of my colleagues also have observed, the Act's federal protection of "navigable waters" does not limit federal responsibilities only to "pollutant" release *initiated* in such waters: the Clean Water Act explicitly covers the introduction of pollutants into navigable waters *from* "point sources," and "[t]he definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories." *Id*. (citing 33 U.S.C. § 1362); *see also id.* at 743. That is, the discharge into navigable waters from actual if non-navigable point sources is an appropriate object of federal concern. But someone putting fill dirt into a backyard rut does not meet that description, and the federal government should acknowledge the important distinction. *See id.* at 744 (plurality) ("'dredged or fill material,' which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an 'addition… to navigable waters' when deposited in upstream isolated wetlands") (citing 33 U.S.C. §§ 1344(a, 1362(12)). And the agencies must carry out their important responsibilities while taking care not to eviscerate what the Supreme Court has called "the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174; *see also Rapanos*, 547 U.S. at 738 (plurality) ("[r]egulation of land use … is a quintessential state and local power").

I believe, therefore, that the President is quite right to direct the agencies to consider "interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the [plurality] opinion of Justice Scalia in *Rapanos*." *Both* prongs of that guidance are significant: the *Rapanos* plurality provides useful insights into the kinds of "relatively permanent" "open waters" that can constitute "navigable waters" as to which federal jurisdiction obtains, and by not losing focus on interpreting the phrase "*navigable* waters" as defined by the Act to mean waters "of the United States," the agencies should be well positioned to chart a sensible and constitutionally sound approach in keeping with the statutory mandate to "recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources." *See* 33 U.S.C. § 1251(b); *see also, e.g.*, 33 U.S.C. § 1370 (except as "expressly provided," law must not be construed in a way "impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters … of such States").

The meaning of "navigable waters" can further be elucidated and elaborated upon, and I respectfully agree that undertaking that enterprise should be very productive in generating clear, comprehensible, and non-arbitrary jurisdictional understandings. Recognizing that the "step one" recodification is a necessary and appropriate "back to the blackboard" interim measure, I look forward to the envisioned "step two" definitional process that should conform agency conduct more precisely to the terms of the law.

Very respectfully yours,

Mike DeWine
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