Congress of the United States
Washington, DC 20515

November 13, 2014

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable John M. McHugh
Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310-0101

Dear Administrator McCarthy and Secretary McHugh,

We write to provide comments on the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers' (Corps) proposed rule regarding the definition of "waters of the United States" under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880). We have previously called on EPA and the Corps to withdraw the proposed rule due to the hardship it would create for homeowners, small businesses, and local communities.

In this letter, as the chairmen and ranking members of congressional committees and subcommittees charged with overseeing the federal government's compliance with the Clean Water Act and the Constitution, we wish to formally object to the proposed "waters of the United States" rule's disregard for federalism and the constitutional and statutory limitations on EPA's and the Corps' jurisdiction over "navigable waters." The proposed rule contemplates an extra-constitutional relationship between the federal government and the States in the regulation of local land-use matters. Thus, the proposed rule subverts the Constitution, Congress, as well as the Clean Water Act's promise to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[1]

Despite the constitutional and statutory limits which bind EPA and the Corps, the proposed "waters of the United States" rule provides essentially no limit to federal regulatory authority under the Clean Water Act. As such, the proposed rule presents a grave threat to Americans' property rights, and its finalization will force landowners throughout the country to live with the unending prospect that their homes, farms, or communities could be subject to ruinous Clean Water Act jurisdictional determinations and litigation.

EPA and the Corps must abandon the proposed "waters of the United States" rule if the Clean Water Act is to be administered consistent with federalism, the Constitution's limits on the federal government's Commerce Clause jurisdiction over "navigable waters," and the statutory limits contained in the Clean Water Act. We appreciate your review of these comments and the reasoning behind our recommendation to withdraw the proposed rule.

[1] Federal Water Pollution Control Act § 101(b), 33 U.S.C. § 1251(b).

I. The Proposed "Waters of the United States" Rule Contravenes the Constitution's Federalism Structure and Provides No Limit to Federal Authority Under the Clean Water Act.

In considering the proper relationship between the federal government and the States, the Framers of the Constitution determined that federalism would serve as a guiding principle. The Framers' purpose was to guarantee that States and their citizens could control their own destiny, in contrast to a government in which local initiative might be impeded by an overbearing federal bureaucracy.[2]

James Madison expounded on this structural idea in The Federalist No. 45, observing that the powers "delegated by the proposed Constitution to the federal government, are few and defined," and "[t]hose which are to remain in the State governments are numerous and indefinite."[3] Whereas the federal government's powers were to be exercised primarily over matters concerning war, peace, and foreign commerce, the powers "reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and internal order, improvement, and prosperity of the State."[4] Thus, federalism "serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another," preserving the "integrity, dignity and residual sovereignty of the States."[5]

Importantly, federalism protects state sovereignty as well as individual liberty. "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[6] It "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[7]

Congress explicitly recognized federalism's importance when it enacted the Clean Water Act in 1972.[8] Congress likewise restricted the EPA's and Corps' authority by predicating Clean Water Act jurisdiction on the presence of "navigable waters," defined as "the waters of the United States, including the territorial seas."[9] Furthermore, because the Clean Water Act is a Commerce Clause enactment, EPA's and the Corps' administration of the law must be constrained and reflect effective bounds to federal regulatory authority.[10] Accordingly, the reach of the "waters of the United States" is inextricably tied to the statute's limiting term, "navigable waters," and

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[2] *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (Federalism "allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.").
[3] THE FEDERALIST No. 45, at 311 (James Madison) (Easton Press 1979).
[4] *Id.*
[5] *Bond*, 131 S. Ct. at 2364.
[6] *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotations and citation omitted).
[7] *Bond*, 131 S. Ct. at 2364.
[8] *See* Federal Water Pollution Control Act § 101(b), 33 U.S.C. § 1251(b).
[9] *See* 33 U.S.C. § 1362(7).
[10] *See United States v. Morrison*, 529 U.S. 598, 608 (2000).

"may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."[11]

EPA and the Corps' proposed "waters of the United States" rule is irreconcilable with these principles. Under the proposed rule, virtually any parcel of land containing a water feature may be deemed a "water of the United States." Rather than preserve the prerogative of the States to manage purely local waterbodies, the proposed rule would centralize the regulation of streams, lakes, ponds, and ditches. As such, the proposed rule represents a dangerous effort by EPA and the Corps to achieve "a significant impingement of the States' traditional and primary power over land and water use."[12]

A. The Proposed "Waters of the United States" Rule's Categorical and Case-by-Case Jurisdictional Provisions Eliminate the Distinction Between Local and National Waterbodies.

Three provisions in the proposed rule's text, as well as EPA's draft report on the connectivity of streams and wetlands to downstream waters, demonstrate that EPA and the Corps are seeking extraordinary authority to classify wholly local waterbodies as "waters of the United States."

i. "Tributaries" as "Waters of the United States"

The proposed "waters of the United States" rule designates "tributaries" as jurisdictional *per se*.[13] "Tributary," however, does not mean "a stream feeding a larger stream or a lake," as one would understand this term in normal parlance.[14] Instead, EPA and the Corps have proposed a sweeping definition for "tributary"[15]:

- Under the proposed rule, "tributary" means "a water physically characterized by the presence of a bed and banks and ordinary high water mark [(OHWM)] . . . which contributes flow, either directly or through another water" to a traditionally navigable water (TNW), an interstate water, territorial sea, or impoundment. On its face, this definition reaches water features far removed from TNW's and other truly national waters. The term's emphasis on mere flow from one water feature to a downstream water will bring countless perennial, intermittent, and ephemeral streams within the definition of "waters of the United States," and the agencies concede as much.[16]

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[11] *Id.* (internal quotations and citation omitted).
[12] *Solid Waste Agency of Northern Cook County v. USACE*, 531 U.S. 159, 174 (2001).
[13] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22262-22263 (proposed April 21, 2014) (hereinafter, "Proposed Rule").
[14] *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 1238 (Merriam-Webster 1979).
[15] *See* Proposed Rule, 79 Fed. Reg. at 22263.
[16] *See id.*, 79 Fed. Reg. at 22206 (discussing definition of "tributary" as-applied to headwaters, intermittent, and ephemeral streams).

- Landowners will face a significant challenge in determining whether a water is "physically characterized by the presence of a bed and a banks and [OHWM]." In making this determination, they must keep in mind that the Corps' prior OHWM assessments have "extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris."[17]

- If water can be traced from a TNW upstream to a local wetland, lake, or pond, that alone is sufficient to bring these water features within the definition of "tributary," even if they lack a bed and banks or OHWM. This standard puts those who own land containing wetlands, lakes, or a pond on notice that their property will likely constitute "waters of the United States" if the proposed rule is finalized.

- EPA and the Corps confirm the broad scope of the term, "tributary," by noting that it can include a natural, man-altered, or man-made water and includes rivers, streams, lakes, ponds, impoundments, canals, and (with limited exceptions) ditches.

ii. "Adjacent" Waters as "Waters of the United States"

The proposed "waters of the United States" rule also deems "[a]ll waters, including wetlands, adjacent to" TNW's, interstate waters, territorial seas, impoundments, and tributaries as jurisdictional *per se*.[18] Similar to "tributary," "adjacent waters" is defined broadly so as to provide EPA and the Corps with significant jurisdictional authority:

- "Adjacent" is defined to mean "bordering, contiguous or neighboring," but the subsequent definition of "neighboring" reveals the agencies' intention to encompass much more than adjoining waters.

- "Neighboring" waters include "waters located within the riparian area or floodplain" of TNW's, interstate waters, territorial seas, impoundments, and tributaries, as well as "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to another jurisdictional *per se* water.

    - "Riparian area" means an area "bordering a water where surface and subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." EPA and the Corps state further that "riparian areas" are "transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."

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[17] *Rapanos v. United States*, 547 U.S. 715, 725 (Scalia, J., plurality opinion) (internal quotations and citation omitted).
[18] Proposed Rule, 79 Fed. Reg. at 22262-22263.

- "Floodplain" means an area "bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."

Undoubtedly, the terms "riparian area" and "floodplain" will be a source of confusion as well as geographic mischief. For example, it is difficult to imagine land where surface or subsurface hydrology *do not* "directly influence the ecological processes and plant and animal community structure," as the term "riparian area" requires. Likewise, many local communities lie in "floodplains" as currently defined in the proposed rule, and therefore could be considered "waters of the United States" in their entirety.

EPA and the Corps have also claimed that "groundwater" is not to be considered "waters of the United States" under the proposed rule.[19] Yet many groundwater-related activities may require Clean Water Act permits because "adjacent waters" includes those "waters with a shallow subsurface hydrologic connection" to other jurisdictional waters. Furthermore, the proposed rule's categorical jurisdiction for waters "adjacent" to (broadly-defined) "tributaries" confirms that EPA and the Corps are seeking immense jurisdictional reach over private land located near wetlands, streams, lakes, rivers, and ponds.[20]

iii. "Other waters" as "Waters of the United States"

As if to ensure that no water feature escapes the regulatory grip of the federal government, EPA and the Corps also propose broad authority to deem "other waters" jurisdictional on a case-by-case basis[21]:

- Under the proposed rule, "other waters, including wetlands" may constitute "waters of the United States," "provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus" to a TNW, interstate water, or territorial sea.

- "Significant nexus" is defined to mean that "a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest [TNW, interstate water, or territorial sea]), significantly affects the chemical, physical, or biological integrity" of a TNW, interstate water, or territorial sea.

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[19] Proposed Rule, 79 Fed. at 22263.

[20] The proposed rule also eliminates the current "waters of the United States" exception for wetlands adjacent to wetlands. *See* 40 C.F.R. § 230.3(s)(7) (the term "waters of the United States" means "[w]etlands adjacent to wetlands (other than waters that are themselves wetlands)"). *See also Great Northwest, Inc. v. United States Army Corps of Engineers*, 2010 U.S. Dist. LEXIS 89132, *26 (D. Alaska 2010) ("[T]he Corps' regulations themselves place wetlands adjacent to jurisdictional wetlands outside the reach of the [Clean Water Act].")

[21] *See* Proposed Rule, 79 Fed. Reg. at 22263.

- "Other waters" are "similarly situated" when they "perform similar functions and are located sufficiently close together to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity" of a TNW, interstate water, or territorial sea.

The scope of land and water features covered under the "other waters" provision is breathtaking. The use of a "region" or watershed as a basis for jurisdiction will provide EPA and the Corps with limitless authority, since the entire United States lies within some drainage basin.[22] EPA and the Corps purport to constrain the "significant nexus" standard as well as the "significant effect requirement" by indicating that for "an effect to be significant, it must be more than speculative or insubstantial." However, this caveat is meaningless because insubstantial waters may be "combin[ed] with other similarly situated waters in the region" in order to demonstrate a "significant effect."

The proposed rule's authorization for waters to be combined or evaluated in the aggregate "is clever, but has no stopping point."[23] Moreover, the proposed rule removes the requirement in the current "waters of the United States" definition that "other waters" be directly connected to interstate commerce in order to be jurisdictional,[24] further raising the specter that future jurisdictional determinations will often fail to be "in pursuance of Congress' power to regulate interstate commerce."[25]

iv. EPA's Draft *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*

EPA appears eager to put forward a report on the connectivity of streams and wetlands in order to justify the broad regulatory assertions contained in the proposed "waters of the United States" rule.[26] There are major concerns associated with EPA's draft "Connectivity Report,"[27] but the

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[22] *See Rapanos*, 547 U.S. at 722 ("[T]he entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls.")

[23] *United States v. Lopez*, 514 U.S. 549, 600 (Thomas, J., concurring).

[24] *See* 40 C.F.R. § 230.3 (authorizing Clean Water Act jurisdiction for "other waters" "the use, degradation or destruction of which could affect interstate or foreign commerce").

[25] *Morrison*, 529 U.S. at 613.

[26] U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, Draft (Sept. 13), available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[27] *See, e.g.*, Letter from Ashley Lyon McDonald (National Cattlemen's Beef Association) and Dustin Van Liew (Public Lands Council) to Ken Kopocis and Jo-Ellen Darcy re: Proposed "Waters of the U.S" Rulemaking at 3 (Oct. 28, 2014) (Docket ID No. EPA-HQ-OW-2011-0880) (noting that EPA's decision to not make final "Connectivity Report" available for public comment "is inappropriate and prevents the public from being able to provide meaningful comments on the proposed rule"); *and* Letter from Board of Douglas County Commissioners to Hon. Gina McCarthy and Hon. Jo-Ellen Darcy re: Proposed "Waters of the U.S." Rulemaking at 3 (Oct. 14, 2014)

fundamental issue is that no amount of study can nullify the Constitution's limits to federal regulatory authority. Although the EPA and Corps' effort to invent scientific support for expanded jurisdiction is creative, jurisdiction under the CWA is a legal exercise not a scientific one.

Indeed, a federal agency may not rely on reasoning that would render the Constitution's enumeration of powers meaningless.[28] However, in the draft "Connectivity Report," EPA engages in precisely this sort of reasoning, asserting that "[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."[29]

There is no limit to federal regulatory authority under the draft report's approach, which conflicts with the constitutional maxim that "[a]ctivities local in their immediacy do not become interstate and national because of distant repercussions."[30] Accordingly, it is inappropriate for EPA and the Corps to rely on the draft "Connectivity Report" for this rulemaking or other regulatory contexts.

B. The Proposed "Waters of the United States" Rule is a Grave Threat to Individual Liberty and Property Rights.

After examining the proposed rule's definitions for "tributary" and "adjacent waters," as well as the case-by-case standard for "other waters," one is hard pressed to identify any waterbody that would be beyond the reach of EPA and the Corps as "waters of the United States." The import of the proposed rule is clear: all water is national water (unless expressly exempted), and land with only a slight connection to a waterbody is within the regulatory purview of EPA and the Corps.

Federalism serves as an absolute bar to such an expansive proposal. The proposed rule's definitions "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[31] Congress did not sanction this approach in the Clean Water Act, and the Constitution forbids it.

The proposed rule's contravention of federalism threatens individual liberty and property rights.[32] By providing EPA and the Corps with virtually unlimited authority under the Clean

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(Docket ID No. EPA-HQ-OW-2011-0880) ("There are significant issues with the current draft Connectivity Report that requires the Agencies' attention before continuing with the rulemaking process.").

[28] *See Morrison*, 529 U.S. at 615.

[29] Draft Connectivity Report at 6-1.

[30] *See A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (Cardozo, J., concurring).

[31] *United States v. Lopez*, 514 U.S. 549, 567 (1995) (majority opinion).

[32] *See Bond*, 131 S. Ct. at 2364 ("Federalism secures the freedom of the individual.") *See also Lynch v. Household*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.") (citing J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the

Water Act, it would force those who wish to build a home, expand a small business, or increase their crop production to obtain the blessing of the federal government. Landowners will have to decide whether to spend up to two years and $270,000 in a burdensome and uncertain permitting process,[33] or proceed without a federal permit and run the risk that EPA could seek fines of up to $187,500 per day for alleged Clean Water Act violations.[34] Stated differently, the proposed rule would "put the property rights of ordinary Americans entirely at the mercy of [EPA] employees."[35]

This disregard for federalism is unacceptable. EPA and the Corps flouted their duty to abide by the limits established by the Framers,[36] dubiously concluding that the proposed "waters of the United States" rule "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[37] The agencies' assertion is fundamentally at odds with the reality that the proposed rule sanctions the federal regulation of what rightly and legally must be considered purely local land and water features.

We recommend that EPA and the Corps take heed of the following admonition: "Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of the States."[38] As a matter of federalism and constitutional governance, the proposed rule must be abandoned.

Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries *138-140).

[33] *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion).

[34] *See* Letter from Senator David Vitter, et al. to Hon. Nancy Stoner, U.S. Environmental Protection Agency (April 1, 2014), available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=4bfeda20-e563-449e-bb86-30e5eefead8b.

[35] *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).

[36] *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[I]t is the obligation of all officers of the Government to respect the constitutional design.").

[37] Proposed Rule, 79 Fed. Reg. at 22220-22221.

[38] *Bond*, 131 S. Ct. at 2366 (citations omitted).

II. The Proposed "Waters of the United States" Rule is an End-Run Around Supreme Court Decisions Which Have Confirmed the Constitutional and Statutory Limits to Clean Water Act Jurisdiction.

When Congress passed the Clean Water Act in 1972, it predicated federal jurisdiction on the presence of "navigable waters."[39] Congress further defined "navigable waters" to mean "the waters of the United States, including territorial seas," expressly referencing the former term in the statute's various regulatory programs.[40] In so doing, Congress evidenced its desire that navigability would serve as a foundational concept for Clean Water Act jurisdiction.

The Clean Water Act's legislative history illustrates Congress's intent to ground federal jurisdiction in navigability. Although "waters of the United States" provided a "new and broader definition" for the term "navigable waters," the purpose of this new definition was to align the statute with the understanding that "there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government."[41] Under the new definition of "navigable waters" as "waters of the United States," navigability would remain critical to jurisdictional inquiries, but interstate concerns less so:

> [I]t is enough that the waterway serves a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communications, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway."[42]

Thus, Congress "was clear that the [Clean Water Act] was anchored by the concept of navigability."[43]

The Supreme Court has confirmed that the term "navigable waters" constrains EPA's and the Corps' authority to regulate discharges into "waters of the United States." In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), the Court held that isolated, nonnavigable ponds were beyond the agencies' statutory authority under the Clean Water Act.[44] And in *Rapanos v. United States*, a majority of the Court rejected the Corps' attempt to designate wetlands located near drainage ditches as "waters of the United States."[45] These cases underscored that "[t]he term 'navigable' has at least the import of

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[39] In general, the Clean Water Act prohibits the unauthorized discharge of pollutants, and defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).
[40] *See* 33 U.S.C. § 1362(7).
[41] 118 Cong.Rec. 33756-57 (1972) (statement of Rep. Dingell).
[42] *Id.* (quoting *Utah v. United States*, 403 U.S. 9, 11 (1971)) (other internal citation omitted).
[43] *The Clean Water Act Following the Recent Supreme Court Decisions in* Solid Waste Agency of Northern Cook County *and* Rapanos-Carabell*: Hearing Before the S. Comm. on Environment and Public Works*, 110th Cong. 44 (2007) (statement of George J. Mannina, Jr.).
[44] *Solid Waste Agency of Northern Cook County v. USACE* (*SWANCC*), 531 U.S. 159 (2001).
[45] *Rapanos v. United States*, 547 U.S. 715 (2006).

showing . . . what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[46]

The proposed "waters of the United States" rule defies the Supreme Court's recognition of the statutory limits Congress placed upon the agencies. In fact, **the proposed rule would reach the very waterbodies in *SWANCC* and *Rapanos* over which EPA and the Corps had unlawfully asserted Clean Water Act jurisdiction.**

For example, in *SWANCC*, the Corps had asserted jurisdiction over small ponds at an abandoned gravel pit. But as the Supreme Court explained, nothing in the Clean Water Act's text or the statute's legislative history suggested that the term "waters of the United States" included nonnavigable, isolated waterbodies like the ponds.[47] The Court observed further that in order to uphold the Corps' interpretation, "we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."[48] Accordingly, the Court held that the Corps exceeded its statutory authority in claiming that the isolated, nonnavigable ponds were jurisdictional.[49]

Remarkably, and notwithstanding *SWANCC*, the proposed "waters of the United States" rule purports to provide ample authority for EPA and the Corps to assert Clean Water Act jurisdiction over the isolated, nonnavigable waters at issue in the Court's decision. The proposed rule indicates that "waters with a shallow subsurface hydrologic connection" to another jurisdictional water are "adjacent" waters and thus "waters of the United States" *per se*.[50] The *SWANCC* ponds and project site were connected to groundwater and located in an area with a documented groundwater connection to the Fox River.[51] Therefore, applying the proposed rule's broad definition for "adjacent" waters, the *SWANCC* ponds and project site would automatically qualify as "waters of the United States" under the proposed rule.

The proposed rule would also authorize EPA and the Corps to designate the ponds and project site as "waters of the United States" under the proposal's "other waters" provision. Under this provision, a waterbody may be considered a jurisdictional "other water" if "those waters alone, or in combination with other similarly situated waters . . . located in the same region, have a significant nexus" to a TNW, interstate water, or territorial sea.[52] Because the proposed rule would authorize isolated, nonnavigable waterbodies to be "combin[ed] with other similarly situated waters in [a] region" in order to satisfy the proposal's "significant nexus" standard, it

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[46] *SWANCC*, 531 U.S. at 172.
[47] *See id.* at 167-169 & 168 n.3.
[48] *Id.* at 168.
[49] *Id.* at 174.
[50] Proposed Rule, 79 Fed. Reg. at 22263.
[51] *See Solving the Problem of Polluted Transportation Infrastructure Stormwater Runoff: Hearing Before the Subcomm. of Water and Wildlife of the S. Comm. on Environment & Public Works*, 113 Cong. __ (2014) (response of J. G. Andre Monette to question for the record, on file with Senator David Vitter).
[52] Proposed Rule, 79 Fed. Reg. at 22263.

would be practically impossible for the *SWANCC* ponds and project site to escape the prospect of EPA or the Corps once again classifying them as "waters of the United States."[53]

EPA and the Corps attempt to limit *SWANCC* to its discussion of the Migratory Bird Rule, appearing to recognize that the proposed rule would result in "waters of the United States" jurisdiction for the *SWANCC* ponds and project site. In the executive summary to the proposed rule, the agencies opine that *SWANCC* "held that the use of 'isolated' nonnavigable intrastate ponds by migratory birds was not *by itself* a sufficient basis for the exercise of Federal authority under the [Clean Water Act]."[54] Similarly, in recent correspondence with members of the Senate Environment and Public Works Committee, EPA claims that the proposed rule "is consistent with [*SWANCC*] and precludes establishing [Clean Water Act] protections for waters based solely on the presence of migratory birds."[55]

These statements suggest that EPA and the Corps believe the Migratory Bird Rule was the only flaw in *SWANCC*, and that other arguments, theories, or information could have saved the day for the government. Yet a fair reading of the Court's decision belies the agencies' myopic viewpoint. The Court in *SWANCC* repeatedly emphasized that its concern was not with the Migratory Bird Rule as such, but the fact that application of the rule resulted in a "waters of the United States" designation over property that was categorically beyond the agency's statutory authority.[56] The Court held that the Corps lacked authority over isolated, nonnavigable ponds because it "read the statute as written."[57] The fact that the asserted jurisdiction had resulted from application of the Migratory Bird Rule was incidental and irrelevant to the Court's decision.

The proposed rule's coverage of the remote wetlands at issue in *Rapanos* is no less disconcerting. In that case, the wetlands were near ditches and man-made drains, which in turn were located 11 to 20 miles from the nearest TNW. The Corps nonetheless claimed that the wetlands were "waters of the United States," and the Sixth Circuit agreed based on its conclusion that Clean Water Act jurisdiction could be "satisfied by the presence of a hydrologic connection" between a remote wetland and TNW.[58]

The Supreme Court rejected this broad theory of Clean Water Act jurisdiction. Writing for the plurality, Justice Scalia determined that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right so that there is no demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water Act]."[59] In contrast, wetlands "with only an intermittent, physically remote

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[53] *Id.*
[54] *Id.* at 22191 (emphasis added).
[55] Letter from Kenneth J. Kopocis, Deputy Assistant Administrator, U.S. Environmental Protection Agency to Hon. David Vitter (Oct. 29, 2014).
[56] *See SWANCC*, 531 U.S. at 168 ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."), 174 ("[W]e find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here.").
[57] *Id.* at 174.
[58] *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004).
[59] *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion).

hydrologic connection to 'waters of the United States'" were not jurisdictional under the plurality approach.[60]

Justice Kennedy likewise dismissed an interpretation of "waters of the United States" that would "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."[61] In his concurring opinion, Justice Kennedy concluded that "[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establishing its jurisdiction."[62] But, Justice Kennedy continued, if a wetland is not adjacent to a TNW, "the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[63] The Justice remarked further that wetlands "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.'"[64]

Taken together, Justice Scalia's and Justice Kennedy's opinion squarely preclude EPA and the Corps from asserting categorical Clean Water Act jurisdiction over wetlands based on a mere hydrologic connection to a TNW. Yet the proposed "waters of the U.S." rule adopts precisely this approach: under the proposed rule, a "tributary" is jurisdictional *per se*, and includes wetlands "if they contribute flow, either directly or through another water" to a TNW, interstate water, or territorial seas.[65] In *Rapanos*, there was no dispute that the wetlands contributed flow to a TNW, meaning that the wetlands at issue in that case would automatically become "waters of the U.S." under the proposed rule.[66]

Notably, although the proposed "waters of the U.S." rule relies heavily on Justice Kennedy's opinion in particular, EPA and the Corps have distorted his approach. For instance, Justice Kennedy suggested that the agencies "may choose to identify categories of tributaries that, due to their volume of flow[,] their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely . . . to perform important functions for an aquatic systems incorporating navigable waters."[67] In no way, however, does this suggestion imply that EPA and the Corps could identify *wetlands themselves* as tributaries, as they have done in the proposed rule.[68] Moreover, the tributary definition proposed by the agencies would sanction the federal regulation of "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," despite Justice Kennedy's warning against such a standard.[69]

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[60] *Id.*
[61] *Rapanos v. United States*, 547 U.S. at 778 (Kennedy, J., concurring).
[62] *Id.* at 782.
[63] *Id.*
[64] *Id.* at 780.
[65] Proposed Rule, 79 Fed. Reg. at 22262-22263.
[66] *See United States v. Rapanos*, 376 F.3d at 642-643.
[67] *Rapanos v. United States*, 547 U.S. at 780-781 (Kennedy, J., concurring).
[68] *See* Proposed Rule, 79 Fed. Reg. at 22263.
[69] *Rapanos*, 547 U.S. at 781.

The proposed "waters of the United States" rule also indicates that its "significant nexus" standard may be satisfied if a water alone or in combination with similarly situated waters "significantly affects the chemical, physical, or biological integrity" of a TNW, interstate water, or territorial sea.[70] Yet Justice Kennedy's opinion makes clear that there must be a significant effect to the chemical, physical, *and* biological integrity of a downstream water in order for the significant nexus standard to be satisfied.[71] The current proposal is far afield from even Justice Kennedy's tailored analysis.

EPA and the Corps to proposal to assert "waters of the United States" jurisdiction over the types of waterbodies at issue in *SWANCC* and *Rapanos* is as astonishing as it is alarming. Worse yet, it demonstrates that the agencies have not learned from the Supreme Court's direction that statutory limits contained in the Clean Water Act must be honored. EPA and the Corps should withdraw the proposed rule as recognition of the infringement upon federalism and liberty the rule would impose.

Conclusion

EPA and the Corps' decision to engage in a "waters of the United States" rulemaking presented the agencies with a significant opportunity to honor the limited authority granted to the executive branch in the Clean Water Act. In examining the law's key jurisdictional provision, the agencies should have reflected the statutory limits established by Congress as well as the Supreme Court's decisions in *SWANCC* and *Rapanos*.

The agencies have failed to take advantage of this opportunity. The proposed "waters of the United States" rule undermines the text of the Clean Water Act and misconstrues Supreme Court precedent. In addition, the proposed rule is antithetical to the Constitution's guarantee of federalism.

For these reasons, we strongly urge EPA and the Corps to withdraw the proposed "waters of the United States" rule.

Sincerely,

Sen. David Vitter
Ranking Member
Senate Committee on
Environment and Public Works

Rep. Bill Shuster
Chairman
House Committee on
Transportation and Infrastructure

[70] Proposed Rule, 79 Fed. Reg. at 22263.
[71] *See Rapanos*, 547 U.S. at 780.

Sen. Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary

Rep. Bob Goodlatte
Chairman
House Judiciary Committee

Sen. James M. Inhofe
Ranking Member
Subcommittee on Oversight
Senate Committee on Environment and Public Works

Rep. Bob Gibbs
Chairman
Subcommittee on
Water Resources and Environment
House Committee on Transportation
and Infrastructure

Sen. John Boozman
Ranking Member
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Rep. Spencer Bachus
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