



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
TIERONE FAX (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

July 7, 2014

Water Docket
United States Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

RE: Docket No. EPA-HQ-OW-2013-0820; *Notice of Availability Regarding the Exemption From Permitting Under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices*; Notice, 79 Fed. Reg. 22276 (April 21, 2014).

Administrator McCarthy:

On April 21, 2014, concurrent with the issuance of the proposed rulemaking concerning the definition of “waters of the United States” for purposes of the Clean Water Act, the United States Environmental Protection Agency, along with the Army Corp of Engineers, announced the availability of a rule, already effective upon the regulated community, purporting to interpret or “clarify the scope” of the “normal farming activity” exemption found at § 404(f)(1)(A) of the Act. *See*, 79 Fed. Reg. 22276. Despite the Agencies’ characterization, we do not believe this to merely be a non-legislative, interpretive rule. Rather, the rule appears to establish new policies intended to bind decision-making by the Agencies and influence actions of the regulated community. As such, its promulgation must comply with the rulemaking strictures of the Administrative Procedure Act. Indeed, the Agencies have promulgated regulations further detailing what farming activities are considered “normal.” *See*, 40 C.F.R. 230 and 33 C.F.R. 320.

The Interpretive Rule explains that the use of the phrase “such as” in § 404(f)(1)(A) has been consistently interpreted to limit the application of the exemption “to the activities named in the statute and other activities of essentially the same character as named,” and “precludes the extension of the exemption...to activities that are unlike those named.” *See*, Interpretive Rule at 2 (citing 44 Fed. Reg. 34264). The Agencies then note that categories of activities named in the statute as constituting “normal farming activities” include “upland soil and water conservation practices.” 33 U.S.C. § 1344(f)(1)(A). The Interpretive Rule acknowledges that “as the statute does not limit the exemption to only those activities explicitly listed, it is reasonable to conclude that agricultural conservation practices that are associated with waters and where water quality benefits accrue are similar enough to also be exempt from the section 404 permitting

requirements.” *See*, Interpretive Rule at 2. The Agencies interpretation should have ended at this point because the inclusion of the final paragraph of the Interpretive Rule moves the action into an actual substantive rulemaking rather than merely a non-legislative interpretation.

The Agencies “interpretation” continues by establishing two new substantive requirements that any conservation activity must meet in order to qualify for the § 404(f)(1)(A) exemption for “normal farming activities.” First, it must be a Natural Resources Conservation Service (“NRCS”) agricultural conservation practice specifically identified by EPA, the Army, and USDA. Second, the activity must be implemented in accordance with NRCS technical standards. The regulated community is then informed that the “EPA, the Army, and the USDA will enter into a Memorandum of Agreement to develop and implement a process for identifying, reviewing and updating NRCS agricultural conservation practices and activities that may include discharges in waters of the United States that would qualify under the exemption established by section 404(f)(1)(A).” *See*, Interpretive Rule at 3.

A Memorandum of Understanding (“MOU”) was signed and made effective March 25, 2014, the same day as the Interpretive Rule. The MOU “describes how the three agencies will work together to implement the interpretive rule, to protect and enhance water quality and ensure consistency and predictability for the public” and “identifies procedures for coordinating to maintain the list of conservation standards exempt from section 404 permitting, including revisions to the list.” *See*, MOU at 1. Attachment A to the MOU identifies the conservation practices that are to be provided an exemption from the need for a dredge and fill permit under § 404(f)(1)(A).

The Interpretive Rule conflicts with the plain language of the § 404(f)(1)(A) by arbitrarily narrowing the scope of the broad “normal farming activity.” Accordingly, the Interpretive Rule is invalid. *See, Gonzales v. Oregon*, 546 U.S. 243 (2006). By limiting the exemption to only those conservation practices specifically identified, the Agencies have impermissibly narrowed the scope of “normal farming” activities that have historically been considered exempt from the CWA. Furthermore, these “normal farming” activities are now subject to performance measures issued by the NRCS, an agency without any authorization or obligation to implement the provisions of the 404 program.

Furthermore, the Interpretive Rule is unlawful because it was not issued in compliance with the notice-and-comment procedure required by the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(c). While the EPA claims that the Rule is merely interpretive—rendering it exempt from notice-and-comment requirement—the Rule is clearly substantive. An interpretative rule must “derive [its] proposition[s] from an existing document whose meaning compels or logically justifies” its requirements. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (quotation omitted).

“If the rule cannot fairly be seen as interpreting a statute or a regulation, and if it is enforced, the rule is not an interpretive rule exempt from notice-and-comment rulemaking.” *Id.* (quotation omitted). In the present case, it cannot be argued that limiting the “normal farming activity” exemption for conservation practices to those specifically identified by the Agencies and conducted in accordance with NRCS standards requirements derives from or is logically justified by any prior statutory text or regulatory provision. To be sure, the Interpretive Rule makes no attempt to identify any such provisions. Rather, these requirements are new legal

mandates nowhere found in the statutory or regulatory text (indeed, *contrary* to the statutory text, as noted above). Those new requirements can be promulgated, if at all, only after following the strictures of notice-and-comment rulemaking. *Id.* Moreover, the Agencies creates a constant state of uncertainty in the agricultural community with respect to the § 404(f)(1)(A) exemption by making the list of exempt practices subject to revision without resort to any of the formal rulemaking procedures of the APA. *See*, MOU Art. V.

Given the changes to the regulatory status quo affected by the Interpretive Rule, the Agencies should withdraw the Rule, revise the Rule to comply with the statutory text (if possible), and then adopt the revised rule in accordance with the procedures for rulemaking set forth in the APA.

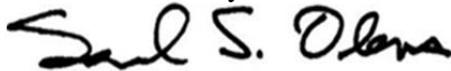
Respectfully,



Jon Bruning
Nebraska Attorney General



Luther Strange
Alabama Attorney General



Sam Olens
Georgia Attorney General



Tom Miller
Iowa Attorney General



Derek Schmidt
Kansas Attorney General



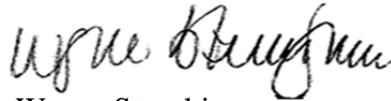
Jack Conway
Kentucky Attorney General



Bill Schuette
Michigan Attorney General



Tim Fox
Montana Attorney General



Wayne Stenehjem
North Dakota Attorney General



Mike DeWine
Ohio Attorney General



Scott Pruitt
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General



Marty Jakley
South Dakota Attorney General



Patrick Morrissey
West Virginia Attorney General



Peter K. Michael
Wyoming Attorney General



June 5, 2014

The Honorable Nancy Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail code: 4101M Washington, DC 20460

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: Comments on Docket ID No. EPA-HQ-OW-2013-0820

Dear Administrator Stoner and Secretary Darcy:

Thank you for the opportunity to comment on the March 25, 2014 interpretive rule addressing the exemptions from permitting provided under section 404(f)(1)(A) of the Clean Water Act (CWA) for discharges of dredged or fill material associated with certain agricultural conservation practices that are designed and implemented to protect and enhance water quality.

The unintended consequences of the interpretive rule would discourage farmers from voluntarily adopting soil and water conservation practices and would increase producer vulnerability for privately implemented practices. This rule would significantly set back Iowa's efforts to implement our nutrient reduction strategy. Our strategy seeks to increase the number of producers that are voluntarily adopting best management practices to address water quality concerns for nutrient loading to the Gulf of Mexico, especially those electing to do so without public funding assistance. This rule specifically prescribes that no NRCS assistance for ensuring compliance with NRCS standards and specifications will be provided to producers implementing practices at their own cost, and would punish them for their good efforts by adding additional regulatory procedures in order to ensure compliance on their own. This would significantly increase their vulnerability, create an uneven playing field discouraging private investment in conservation and add to the already large backlog of unmet demand for public cost-share assistance.

The effect of the interpretive rule on agricultural exemptions from Section 404 permitting requirements for "normal farming activities" is an issue of great concern. We request that EPA and the Corps modify this rule to clearly allow producers to self-certify that practices meet applicable NRCS standards or remove the compliance tie to NRCS standards entirely for privately implemented practices. We ask that at a minimum the rule include a rebuttable assumption that conservation practices constructed in good faith by landowners and their contractors, with or without the prior approval of the NRCS, qualify for exemptions under the interpretive rule and that reasonable modifications or restorations to their work first be given full consideration before CWA Section 404 permit applications are demanded or any

enforcement actions are undertaken. There are serious concerns with linking exemptions for normal farming practices to NRCS standards and specifications for compliance. Many of these activities are implemented privately by producers with no public funding assistance, and by linking exemptions to NRCS standards for compliance it may serve to discourage these activities from occurring. NRCS will not confirm or verify practices meet their standards for producers not receiving technical or financial assistance from USDA. NRCS also will not conduct field visits for practice verification for producers not receiving technical or financial assistance from USDA. This leaves producers wishing to privately implement conservation practices few options for verifying compliance with NRCS standards under this rule. Additional clarity is needed in this rule to identify what types of landowner assurances would satisfy EPA and the Corps that private practice implementation was conducted in accordance with applicable NRCS practice standards.

Additionally, this rule notably does not cover exemptions to other provisions of the Clean Water Act (especially Section 402 NPDES permitting requirements for pesticide applications), and as such provides little reassurance of decreasing producer vulnerability.

Changes are needed related to the exemption list for conservation practices. Pursuant to CWA section 404(f)(1), normal farming practices (including upland soil and water conservation practices) are exempt from permitting requirements. To that end, the listed exemptions should also include grade stabilization structures, terraces, wetland creation, ponds, sediment basins, cover crops, and any other conservation practices meeting the Federal agencies' inclusion means test of being designed to enhance and protect water quality and be implementable in waters of the US. The list of exempt practices may wrongly be interpreted as an exclusive list of activities exempt under CWA Section 404(f)(1). It would be helpful to add language clarifying that the list of practices "includes, but is not limited to" the named practices. Additionally, it should be clarified in the interpretive rule that many practices on the exempt list are not likely to occur in waters of the US and are not covered by CWA's jurisdiction.

We respectfully request that EPA and the Corps make these suggested changes and work with USDA and affected stakeholders to address the concerns expressed. We have also separately requested an extension of the comment period from 45 days to 180 days.

Sincerely,



Bill Northey
Iowa Secretary of Agriculture

Contact:
Amanda Bryant
Director, Communications
(202) 296-9680
amanda@nasda.org

FOR IMMEDIATE RELEASE
September 12, 2014

NASDA Members Say “Withdraw” to EPA’s Waters of the U.S. Rule

At the Annual Meeting of the National Association of State Departments of Agriculture (NASDA), NASDA Members unanimously called on the Environmental Protection Agency (EPA) and US Army Corps of Engineers to withdraw the proposed Waters of the U.S. Rule. The action item, submitted by North Dakota Commissioner of Agriculture Doug Goehring, also urges the EPA and US Army Corps of Engineers to collaborate with state departments of agriculture and other stakeholders on the appropriate scope of federal Clean Water Act jurisdiction.

“As it stands, this proposed rule dramatically expands EPA’s jurisdiction and creates too much uncertainty for our farmers and ranchers. This rule must be withdrawn,” said NASDA CEO Dr. Barbara Glenn. “It is critical that the agencies engage state regulators and stakeholders to work together to find a path forward before the agencies move towards implementation or further rulemaking.”

NASDA previously submitted [comments](#) expressing concerns about the highly controversial Interpretive Rule for Agricultural Conservation Practices.

“Conservation and environmental protection are among our members’ chief responsibilities as state regulatory agencies. We feel the agencies’ proposals will dissuade the use of critical conservation practices needed to preserve American farmland,” said Glenn.

NASDA is a nonpartisan, nonprofit association which represents the elected and appointed commissioners, secretaries, and directors of the departments of agriculture in all fifty states and four U.S. territories. To learn more about NASDA, please visit www.nasda.org.

###



October 3, 2014

Water Docket
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Docket identification (ID) No. EPA-HQ-OW-2011-0880

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed rule, "Definition of 'Waters of the United States' Under the Clean Water Act."

We believe the proposed rule will have a significant impact on Iowa agriculture and efforts to meet Iowa's nutrient reduction goals. Iowa State University has a strong interest in these issues, not only because the long-time work of our scientists and extension specialists in helping farmers and landowners address water quality concerns, because of our central role in development of the Iowa Nutrient Reduction Strategy.

The Iowa Nutrient Reduction Strategy is the first statewide plan to use a science and technology-based approach to assess and reduce nutrients delivered to Iowa waterways. Our researchers, working with others in state and federal government agencies, conducted the science assessment upon which the strategy is based. Their work quantified the effectiveness of practices on reducing nutrient losses from the landscape. We believe the Iowa Nutrient Reduction Strategy has become a model for other states as they consider how to address these issues.

Because of their recent involvement and expertise associated with Iowa's statewide nutrient reduction strategy, several of our scientists reviewed the proposed "Waters of the United States" rule.

In summary, we believe the proposed rule will generate great uncertainty among farmers in making informed decisions on soil and water conservation practices. The rule as currently written may result in farmers who are more reluctant to engage in potentially beneficial conservation practices or who are hindered in their ability to effectively implement practices. As such, the proposed rule places an undue burden on the conservation services provided by state and federal agencies.

Based on our scientists' review and input, I am submitting comments and suggested actions in four areas.

1. **Exemption for normal farming, silviculture, and ranching activities in section 402:** Under the proposed rule, Prior Converted Cropland (PCC) and Farmed Wetlands (FW) that are within agricultural fields and that have been actively farmed for generations could suddenly be deemed jurisdictional. (*"Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA."*) Section 404 provides an exemption for normal farming, silviculture and ranching activities in these areas. However, section 402 does not provide a similar exemption, and normal farming practices could now be prohibited. How can farmers be sure actions they take as part of a normal practice, such as pesticide application, will not later be deemed a federal violation? It is inconsistent for a typical farming operation with Prior Converted Cropland (PCC) and Farmed Wetlands (FW) to receive an exemption under Section 404, but not under Section 402.

Action: We ask that an agricultural exemption for Prior Converted Cropland (PCC) and Farmed Wetlands (FW) be developed under Section 402 that parallels the exemption that currently exists in Section 404. This will provide consistency and reduce uncertainty for farmers.

2. **Normal farming practices:** The definition of normal farming practices in the proposed rule and the accompanying interpretive rule refers to the exemptions in Section 404(f). 404 (f)(a) states the following activities are exempt, "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

Action: Two key practices missing from this list of normal farming practices are nutrient management and pest management. Rather than assume these important practices are included or implied, we request these two items be explicitly included in the list of approved activities, thus: "...such as plowing, seeding, cultivating, nutrient management, pest management, minor drainage...."

3. **NRCS practice standards:** In the interpretive rule issued in an attempt to further define "normal farming practices," 56 Natural Resources Conservation Service (NRCS) Conservation Practice Standards were listed. There certainly are more than 56 activities that would fall under the heading of "normal farming practices." Additionally, no reference is made as to how Practice Standards would be added to the list as new technologies are developed. In short, listing the 56 Practice Standards increases rather than reduces confusion.

Also, NRCS Conservation Practice Standards were not designed and vetted to be regulatory tools. Using NRCS Practice Standards as regulatory tools represents a fundamental shift in the role of the NRCS, as these standards should not be applied outside of U.S. Department of Agriculture (USDA) programs. As drafted, the proposed rule may discourage a farmer wanting to implement a conservation practice without using USDA cost-share funds or technical assistance, or utilizing an innovative design. Such private investments in conservation practices should not be discouraged, and NRCS design standards should not be required.

Action: Well-written regulations define what cannot be done, rather than what can be done. To provide clarity and consistency, we ask for a list of conservation practices and normal farming practices that are **not** exempt under this rule, along with what permits would be required. However, if a decision is made to list acceptable NRCS Conservation Practice Standards, then **all** practice standards must be listed, not just 56.

4. **Economic analysis:** The EPA's economic analysis states the proposed rule will result in jurisdictional waters of the United States increasing by 3.2 percent. Numerous questions have been raised about this economic analysis — for example, how it was conducted, what methodology was used, what will be the specific impact in each state and whether it is representative of the actual situation in each state. **The methodology does not** produce the true measure of the actual impact of the proposed rule.

Action: We ask that a thorough analysis of the impact of the proposed rule be conducted, with specific information provided by state that includes the number and location of new jurisdictional acres. Also, we ask that clarification be provided on the assumed marginal impact on costs and revenue of these acres. Are these acres that are taken out of production, or acres that will have higher costs due to requiring permits and changes in practices, or both?

Thank you again for the opportunity to comment and for your consideration of the four concerns listed.

Sincerely,



Wendy Wintersteen
Endowed Dean and Director

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA



E. SCOTT PRUITT
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA



PATRICK MORRISEY
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF NEBRASKA



JON BRUNING
ATTORNEY GENERAL

October 8, 2014

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

The Honorable John M. McHugh
Secretary
Department of the Army
The Pentagon, Room 3E700
Washington, D.C. 20310

[Submitted electronically via Regulations.gov](#)

Re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880)

Dear Administrator McCarthy and Secretary McHugh,

As leaders in our States, we write to express our serious concerns regarding the Proposed Rule issued by the Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") (collectively "the Agencies"), which impermissibly seeks to broaden federal authority under the Clean Water Act ("CWA") and which we believe will impose unnecessary barriers to advancing water quality initiatives nationwide. 79 Fed. Reg. 22,188 (Apr. 21, 2014) ("Proposed Rule"). In enacting the CWA, Congress specifically explained that the CWA was

designed 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). Yet, the Proposed Rule violates these mandatory principles, and seeks to place the lions’ share of intrastate water and land management in the hands of the Federal Government.

The Proposed Rule’s scope is truly breathtaking. The Rule introduces terms such as “tributary,” “riparian area,” and “flood plain” and then defines these terms extremely broadly, in order to declare that large amounts of intrastate land and waters are always within the Agencies’ authority. The Rule then pairs that already capacious coverage with a virtually limitless catch-all such that almost no water or occasional wet land is ever safe from federal regulation. The Rule seeks to bring within the Agencies’ power every water and land that happens to lie within giant floodplains on the supposition that those waters and lands may connect to national waters after a once-in-decade rainstorm. It sweeps in roadside ditches that are dry most of the year so long as those ditches have a bank and a minimum amount of water flow at some points in the year. It captures little creeks that happen to lie within what the Agencies may define as a “riparian area” and covers many little ponds, ditches, and streams. And it gives farmers and homeowners no certainty that their farms and backyards are ever safe from federal regulation.

The Agencies should reverse course immediately. As explained below, numerous features in the Proposed Rule are illegal. Under the Supreme Court’s CWA cases, these aspects of the Proposed Rule exceed the statutory requirements of the CWA, the federalism policies embodied in the CWA, and the outer boundaries of Congress’ constitutional authority. The Agencies should thus withdraw the Proposed Rule and replace it with a narrow, common-sense alternative that gives farmers, developers, and homeowners clear guidance as to the narrow and clearly-defined circumstances where their actions require them to obtain a federal permit under the CWA. In order to help develop that common-sense alternative, we urge the Agencies to meet with State officials, who can help the Agencies understand the careful measures the States are already taking to protect the lands and waters within their borders.

I. Background

A. The Clean Water Act’s Permitting Requirements

Under the Clean Water Act of 1972, the Agencies have regulatory authority over “navigable waters,” defined as “waters of the United States.” 33 U.S.C. §§ 1344, 1362(7). Inclusion of a water as a “water of the United States” triggers the CWA’s onerous permitting requirements. Anyone who wants to discharge a “pollutant” into “waters of the United States” must obtain a permit from either EPA or the Corps depending on the type of discharge involved. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). In turn, “[t]he discharge of a pollutant” is defined broadly to include ‘any addition of any pollutant to navigable waters from any point source,’ and ‘pollutant’ is defined broadly to include not only traditional contaminants but also solids such as

“dredged spoil, . . . rock, sand, [and] cellar dirt.” *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (citing 33 U.S.C. §§ 1362(12), 1362(6)).

Obtaining a discharge permit is an expensive and uncertain process, which can take years and cost tens and hundreds of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344 (describing the discharge permitting process). Discharging into the “waters of the United States” without a permit, or violating any permit condition, can subject a farmer, developer or private homeowner to criminal or civil penalties, including fines of up to \$37,500 per violation, per day. 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

B. Supreme Court Decisions Rejecting The Agencies’ Overbroad Interpretations Of “Waters Of The United States”

The Proposed Rule involves the central issue of defining the Agencies’ jurisdictional reach under the CWA: what constitutes “navigable waters,” or “waters of the United States.” “For a century prior to the CWA, [the Supreme Court] had interpreted the phrase ‘navigable waters of the United States’ in the Act’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 opinion) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). Accordingly, after Congress enacted the CWA, the Corps “initially adopted this traditional judicial definition for the Act’s term ‘navigable waters.’” *Id.* (citing 39 Fed. Reg. 12119, codified at 33 CFR § 209.120(d)(1)). After a district court ruled this definition was too narrow, the Corps went to the opposite extreme, issuing regulations that sought to define “waters of the United States” as extending to the limits of Congress’ authority under the Commerce Clause. *Id.* at 724 (citing 40 Fed. Reg. 31,324-31,325 (1975); 42 Fed. Reg. 37,144 & n.2 (1977)).

While the Supreme Court in 1985 upheld a portion of those regulations to include wetlands that “actually abut[ted] on” traditional navigable waters, *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 135 (1985), the Court has since issued two significant opinions rejecting the Agencies’ overbroad assertions of CWA authority:

In *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (*SWANCC*), the Supreme Court examined the Corps’ asserted jurisdiction over any waters “[w]hich are or would be used as habitat” by migratory birds. The Court held that this exceeded the Corps’ CWA authority because the CWA did not reach “nonnavigable, isolated, intrastate waters” such as seasonal ponds. *Id.* at 171. The Court explained that its holding was supported by the doctrine that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result,” *id.* at 172, adding that this concern is particularly important here because an overbroad interpretation of the CWA would “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power,” *id.* at 173. The Court explained that extending the Corps’ CWA jurisdiction to isolated, seasonal ponds would raise “significant constitutional

questions” regarding Congress’ constitutional authority and that there is “nothing approaching a clear statement from Congress” that it had sought to invoke the outermost limits on that authority. *Id.* at 174. To the contrary, Congress specifically chose to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources” *Id.* (quoting 33 U. S. C. § 1251(b)).

Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court further narrowed the Agencies’ regulatory authority under the Act. *Rapanos* involved the Corps’ attempt to assert CWA jurisdiction over several wetlands adjacent to nonnavigable tributaries of core waters. The Court’s majority consisted of two opinions:

First, Justice Scalia wrote a plurality opinion on behalf of four Justices rejecting the Corps’ expansive interpretation of “waters of the United States.” The plurality first explained that “[i]n applying the definition of [‘waters of the United States’] to ‘ephemeral streams,’ ‘wet meadows,’ storm sewers and culverts, ‘directional sheet flow during storm events,’ drain tiles, manmade drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term ‘waters of the United States’ beyond parody.” *Id.* at 734. The plurality then held that “‘waters of the United States’” covers only “‘relatively permanent, standing or continuously flowing bodies of water’” and secondary waters, which have a “‘continuous surface connection’” to these relatively permanent waters. *See Id.* at 739-42. In contrast, “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters.” *Id.* at 742.

Second, Justice Kennedy also rejected the Corps’ interpretation, explaining that CWA jurisdiction was only appropriate where the waters involved are “waters that are navigable in fact or that could reasonably be so made” or secondary waters that have a “significant nexus” to in-fact navigable waters. *Id.* at 759. Writing only for himself, Justice Kennedy articulated that a “significant nexus” exists only where the wetlands, “alone or in combination with similarly situated lands in the region,” “significantly affect the chemical, physical, *and* biological integrity of other covered waters understood as navigable in the traditional sense.” *Id.* at 780 (emphasis added). Justice Kennedy explained that the Agencies’ overbroad approach is impermissible because it “would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.” *Id.* at 778. Justice Kennedy added that an interpretation that permitted the Agencies to assert jurisdiction over a “wetlands (however remote)” or “a continuously flowing stream (however small)” would similarly fall outside of the CWA’s reach. *Id.* at 776-77.

C. The Proposed Rule’s Overbroad Definition Of “Waters Of The United States”

The Proposed Rule operates by first defining core waters—that is, those waters that would fall into traditional meaning of the term “navigable waters of the United States”: “waters that are ‘navigable in fact’ or readily susceptible of being rendered so.” *Rapanos*, 547 U.S. at

723 (plurality opinion) (quoting *The Daniel Ball*, 10 Wall. at 563). Under the Proposed Rule, these core waters include all waters that are currently used—or were used in the past—for interstate or foreign commerce, as well as all territorial seas. 40 C.F.R. § 230.3(s)(1)-(3). In addition, the Proposed Rule also seeks to include all “interstate waters, including interstate wetlands” within this definition of core waters, *id.*, even where such interstate waters are not navigable and thus not within the traditional definition of “waters of the United States.” This last aspect of the proposed definition of core waters is problematic, as discussed below.

Beyond these core waters, moreover, the Proposed Rule seeks to define as “waters of the United States” those waters and occasional wet lands that have a relationship with core waters. While the Supreme Court has previously allowed the Agencies to expand the CWA’s coverage to some secondary waters, *see Riverside*, 474 U. S. at 121, the Agencies here have attempted to expand that narrow additional authority to assert jurisdiction over extremely broad swaths of intrastate water and land. Three particular features of the Proposed Rule’s coverage of secondary waters are new and particularly troubling assertions of CWA jurisdiction:

(1) The Proposed Rule declares that all “tributaries” of both core waters and impoundments of core waters (dams or reservoirs) are *always and per se* covered by the CWA. 40 C.F.R. § 230.3(s)(5). The Proposed definition of “tributaries” is extremely broad, sweeping up ponds, ephemeral streams, and usually dry channels. 40 C.F.R. § 230.3(u)(5).

(2) The Proposed Rule declares that all geographically-related “adjacent” waters are *always and per se* covered by the CWA. *Id.* § 230.3(s)(6). The Proposed Rule defines “adjacent” waters as—among other features—those waters “within the riparian area or floodplain of” core waters, impoundments, or tributaries. *Id.* § 230.3(u)(1)-(2). “Riparian area” and “floodplain” are broad, poorly defined concepts that sweep up large portions of water, wetlands, and lands usually dry for most of the year. *Id.* § 230.3(u)(3)-(4).

(3) Even for waters that escape the Agencies’ capacious *per se* categories, the Proposed Rule provides that such waters are covered by the CWA on a “case-by-case basis,” so long as a particular water “in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a” core water. *Id.* § 230.3(s)(7). The Rule defines this inquiry as whether these “similarly situated waters” “significantly affect[] the chemical, physical, *or* biological integrity” of a core water. *Id.* § 230.3(u)(7) (emphasis added).¹

The sum total of these provisions is that the Proposed Rule would place virtually every river, creek, stream, along with vast amounts of neighboring lands, under the Agencies’ CWA

¹ The Proposed Rule also includes several very narrow exceptions regarding waters that the Agencies have deemed never to have a “significant nexus” to core waters. *Id.* § 230.3(t).

jurisdiction. Many of these features are dry the vast majority of the time and are already in use by farmers, developers, or homeowners.

II. Discussion

A. The Proposed Rule Needlessly Replaces State And Local Land Use Management With Top-Down, Federal Control

As the Supreme Court explained in *SWANCC*, in enacting the CWA, Congress wanted to preserve the States' historical primacy over the management and regulation of intrastate water and land management. 531 U. S. at 171-74. Congress memorialized that respect for traditional state authority by specifically stating in the CWA's text that the Agencies must "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) (emphasis added). The States have continued to carry out this obligation dutifully since Congress enacted the CWA, protecting land and water resources consistent with local conditions and needs.

The Proposed Rule disregards the statutory requirement mandating respect for State primacy in the area of land and water preservation and instead makes the Federal Government the primary regulator of much of intrastate waters and sometimes wet land in the United States. The Agencies may not arrogate to themselves traditional state prerogatives over intrastate water and land use; after all, there is no federal interest in regulating water activities on dry land and any activities not connected to interstate commerce. Instead, States by virtue of being closer to communities are in the best position to provide effective, fair, and responsive oversight of water and land use and have consistently and conscientiously done so.

And, of course, the imposition of CWA's requirements on waters and lands far removed from interstate, navigable waters is harmful not only to the States themselves, but to farmers, developers and homeowners. As explained below, the Proposed Rule treats numerous isolated bodies of water as subject to the Agencies' jurisdiction, resulting in landowners having to seek permits or face substantial fines and criminal enforcement actions. Nor must land have water on it permanently, seasonally, or even yearly for it to be a "water" regulated under the Act. And if a farmer makes a single mistake, perhaps not realizing that his land is covered under the CWA's permit requirements, he could be subject to thousands of dollars in fines and even prison time.

B. The Proposed Rule Exceeds The Agencies' Authority Under The CWA

The Proposed Rule is also unlawful under the plain terms of the CWA. The Justices comprising the *Rapanos* majority put forward two different tests for when a secondary water can be considered a "water of the United States." Under the four-Justice plurality's test, the question is whether the water has a continuous surface connection to a core water. *See* 547 U.S. at 739-

42. Under Justice Kennedy’s test, the question is whether the water has a “significant nexus” to a core water. *Id.* at 759. Under either test, the Proposed Rule is illegal in numerous respects.

1. Per Se Coverage Of All Tributaries

The Proposed Rule declares that all “tributaries” of core waters and impoundments of core waters are *always and per se* “waters of the United States.” 40 C.F.R. § 230.3(s)(5), *see also* 79 Fed. Reg. 22,199 (April 21, 2014). The Proposed Rule then defines a “tributary” as anything with “presence of a bed and banks and ordinary high water mark...which contributes flow” into a core water, even if such a flow is “ephemeral.” 40 C.F.R. § 230.3(u)(5) (emphasis added), 79 Fed. Reg. 22,201-02.

This definition of “tributary” fails the test set out by the four-Justice *Rapanos* plurality. While the plurality emphasized the requirement that the non-core water must have a “continuous surface connection” with a core water, the Proposed Rule’s definition of “tributary” requires only *any* flow into a core water—or even an impoundment of a core water—making the proposed definition clearly overbroad. Indeed, the plurality specifically rejected CWA jurisdiction for “streams whose flow is [c]oming and going at intervals . . . [b]roken, fitful, or existing only, or no longer than, a day, diurnal . . . short-lived,” which contradicts the Proposed Rule’s assertion that “tributaries” are *per se* “waters of the United States.” *Rapanos*, 547 U.S. at 733 n.5.

The “tributary” definition just as clearly fails Justice Kennedy’s “significant nexus” test. Under the Proposed Rule, even roadside ditches or depressions that *ever* send *any* flow into core waters are “waters of the United States.” This falls far short of a “significant nexus” as, under the Proposed Rule, the flow need not have any impact on “the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense.” *Id.* at 780. Indeed, Justice Kennedy rejected CWA jurisdiction for any “wetlands [that] lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters” and specifically rejected an interpretation that would grant CWA jurisdiction over even a “continuously flowing stream (however small).” *Id.* at 776-79. This reasoning is directly at odds with the Proposed Rule’s “tributary” definition, which includes even “ephemeral” flows.

In addition, the Proposed Rule’s attempt to sweep in any tributary of an impoundment of a core water would be unlawful under Justice Kennedy’s test. The inclusion of any tributary to any impoundment—that is, a dam or reservoir of a core water—is effectively a “double nexus” approach. Under Justice Kennedy’s test, only one nexus is allowed: a non-core water can be covered under the Act if that non-core water has a significant nexus to a core water. But here, the Proposed Rule asserts federal jurisdiction over a chain of waters, with only the final one being a core water. Under the Proposed Rule, so long as a non-core water (like an dam or reservoir) has a “significant nexus” to a core water, any water that has a “significant nexus” to that dam or reservoir is also included in “Waters of the United States.” This is directly contrary

to Justice Kennedy's approach of requiring each non-core water covered under the Act to have a "significant nexus" connection to an actual core water. *Id.* at 779.

2. Per Se Coverage Of All "Adjacent" Waters

The Proposed Rule declares that all waters "adjacent" to core waters, impoundments or tributaries are *always and per se* "waters of the United States." 40 C.F.R. § 230.3(s)(6), 79 Fed. Reg. 22, 199 (April 14, 2014). This is unlawful in multiple respects.

First, the Agencies' assertion that all waters "adjacent" to tributaries or impoundments are always "waters of the United States" is impermissible. This suffers from a similar problem as the Proposed Rule's inclusion of tributaries. The *Rapanos* plurality requires a "continuous" surface connection to a core water, not to a mere adjacency to the tributary or impoundment of a core water. Justice Kennedy would only permit the Agencies to extend their reach beyond core waters upon a showing that the secondary water had a "significant nexus" to actual core waters. *Rapanos*, 547 U.S. at 759. The Proposed Rule, however, does not require this significant nexus. Not all tributaries covered under the Proposed Rule have a significant nexus to core waters, as explained above. The Proposed Rule adds to this problem by then making all the waters and wetlands adjacent to tributaries or impoundments covered waters as well—even though none of these adjacent waters or wetlands may have a significant nexus itself with a core water.

Second, EPA's assertion that any water that is "bordering [or] contiguous" to core waters is automatically a "water of the United States" (40 C.F.R. § 230.3(u)(1)) is similarly unlawful. Under the approach of the *Rapanos* plurality, the bordering relationship must be one of "continuous surface connection," whereas not every water "bordering [or] contiguous" to a core water under the Proposed Rule has a "*continuous*" surface connection to a core water. Further, this aspect of the Proposed Rule is directly contrary to Justice Kennedy's explanation in *Rapanos* that CWA jurisdiction does not extend to "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream." *Rapanos*, 547 U.S. at 776. Under Justice Kennedy's reasoning, a mere water-surface connection is insufficient for CWA jurisdiction without a greater showing of impact on core waters and thus it necessarily follows that merely being "bordering" or "contiguous" cannot satisfy the "significant nexus" test on a *per se* basis.

Third, EPA's definition of "adjacent" waters that are considered *per se* waters of the United States to include any "flood plain" and "riparian area" is illegal. 40 C.F.R. § 230.3(u)(1)-(3). Under the approach of the *Rapanos* plurality, the connection between a core water and a secondary water must be "continuous," whereas by definition the "flood plains" and "riparian area" generally lack such a connection. 547 U.S. at 739-42. For example, a "flood plain" generally only has a surface connection to a water during the time of a flood.

The Agencies' attempt to regulate any "flood plain" and "riparian area" is similarly overbroad under Justice Kennedy's test. The Proposed Rule's definition of "flood plains" would

sweep in areas “inundated during periods of moderate to high water flows” without specifying how regularly such inundation must occur. This means that if an isolated pond resides in an area that would be flooded once every 100 years after an extreme storm, that pond may well become part of the “waters of the United States.” A once-a-century—or even once-a-decade—connection to a core water does not significantly impact the “chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense.” *Id.* at 780. Similarly, EPA’s definition of “riparian area” as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area” sweeps much too broadly because the *amount* of influence for a particular area may well be *de minimis*, in violation of the “substantial nexus” test.

More broadly, that the Agencies’ belief that Justice Kennedy’s confined significant nexus test permits them to regulate every water and land falling into a “flood plain” and “riparian area” shows how far the Agencies’ interpretation is from Justice Kennedy’s. Justice Kennedy’s opinion in *Rapanos* only permitted jurisdiction for wetlands that, “alone or in combination with similarly situated lands in the region,” “significantly affect the chemical, physical, and biological integrity of other covered waters.” *Id.* at 761. Moreover, he emphasized that wetlands did not include “simply moist patches of earth” but only “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” *Id.* at 761 (citation omitted). “When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” *Id.* at 780. Attempting to regulate under the CWA any land or water in a whole flood plain or riparian area sweeps in far more territory, including territory that has only speculative or insubstantial effects on chemical, physical, and biological integrity of core waters. Whole flood plains and riparian areas, which may be largely dry or have varied and far-spread features, and only have a tangential chemical or biological connection to a core water, include far too much to be significantly connected under Justice Kennedy’s careful approach.

In addition, under the Proposed Rule, the size of the “flood plain” and “riparian area” is left to “best professional judgment” of EPA, adding ambiguity on top of the impermissibly broad definitions. 79 Fed. Reg. at 22,208-09.

3. Case-by-Case Coverage Of All Other Waters

The Proposed Rule also provides that a secondary water that somehow escapes inclusion within the Proposed Rule’s broad *per se* categories can still be a “water[] of the United States” if the Agencies determine—on a “case-by-case basis”—that the water “in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a” core water. The Proposed Rule then provides that this inquiry covers any water that may

“significantly affect[] the chemical, physical, *or* biological integrity” of a core water. 40 C.F.R. §§ 230.3(s)(7), 230.3(u)(7) (emphasis added).

This *ad hoc* approach clearly violates the test adopted by the *Rapanos* plurality, as it includes innumerable waters without a “continuous surface connection” to core waters. And while the Agencies have attempted to tether themselves to Justice Kennedy’s *Rapanos* opinion, their approach is far broader than Justice Kennedy would permit. While Justice Kennedy would require a water to “significantly affect the chemical, physical, *and* biological integrity of other covered waters,” the Proposed Rule only requires a water to “significantly affect[] the chemical, physical, *or* biological integrity” of a core water. In addition, the Agencies’ conclusion that the “combination with other similarly situated waters” can take place across any “region”—combined with the unbounded discretion in EPA’s description of the inquiry—threatens to swallow any remaining waters. The Proposed Rule defines “region” as “the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry,” which can be extremely broad areas. 79 Fed. Reg. 22,199, n.6. This case-by-case analysis allows waters in entire watersheds and large regions to be assessed in the aggregate, thus diminishing the significance of the “nexus” any individual feature must have with a core water.

In addition and critically, the Proposed Rule’s inclusion of this catch-all category defeats the claimed purpose of the Rule of bringing “transparency, predictability, and consistency” to the scope of CWA jurisdiction, such that farmers, land developers and homeowners can know where the Agencies’ assertion of authority ends. 79 Fed. Reg. at 22,190. The inclusion of this vague catch-all category will leave these parties in just as much uncertainty as before the Proposed Rule regarding whether their isolated creeks, ponds, and occasional wet lands are subject to the Agencies’ reach, such that a federal permit is mandatory. Accordingly, we urge in the strongest possible terms that the Agencies eliminate the catch-all from any final rule.

4. Classification Of Any Interstate Water As A Core Water

The Proposed Rule also classifies any and all “interstate waters, including interstate wetlands” as core waters. 40 C.F.R. § 230.3(s)(2). This sweeps non-navigable interstate waters into the definition of core water. With non-navigable interstate waters deemed core waters, every water or occasional wet land connected to that water under the Proposed Rule’s broad tributary, adjacency and catch-all provisions will also be swept into the Agencies’ jurisdiction.

This is plainly unlawful. Both *Rapanos* opinions held that core waters must be navigable waters or at least reasonably made to be so. The *Rapanos* plurality held that “a ‘wate[r] of the United States,’” meant “a relatively permanent body of water connected to traditional interstate *navigable* waters,” 547 U.S. at 742 (emphasis added), which would obviously not apply to non-navigable waters. Similarly, Justice Kennedy’s understanding of core waters is “waters that are or were *navigable* in fact or that could reasonably be so made,” 547 U.S. at 759, which similarly

excludes most non-navigable interstate waters. The Agencies' attempt to expand the categories of core waters to include non-navigable waters should thus be withdrawn.

C. The Proposed Rule Would Render The Clean Water Act In Excess Of Congress's Powers Under The Commerce Clause

In *SWANCC*, the Supreme Court rejected a previous attempt by the Corps to expansively interpret the term "waters of the United States," in part based upon the canon of constitutional avoidance. As the Court explained, the Corps may not adopt an interpretation of the CWA that would create significant questions regarding whether the CWA exceeded Congress' constitutional authority. 531 U.S. at 174. Without deciding whether the Corp's assertion of CWA authority would exceed constitutional bounds, the Court reasoned that Congress did not intend to invoke its constitutional authority to its outermost limits, and instead "chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" *Id.* (quoting 33 U.S.C. § 1251(b)). Both the four-Justice plurality in *Rapanos* and Justice Kennedy stressed that these concerns remain live as the Court interprets the CWA going forward. The plurality explained that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power." *Rapanos*, 547 U.S. at 738. And Justice Kennedy noted that the significant nexus test "prevents problematic applications of the statute." *Id.* at 782.

The Court's concerns that the CWA not be interpreted to reach to the limits of Congress's Commerce Clause authority apply with special force to the Proposed Rule. While *SWANCC* and *Rapanos* involved discrete examples of the Agencies' overreach into intrastate matters, the Proposed Rule is a wholesale assertion of virtually limitless authority over broad swaths of intrastate waters and lands. For many of the proposal's applications discussed above, the waters and lands covered are entirely outside of Congress' authority under the Commerce Clause, such as non-navigable intrastate waters that lack any significant nexus to a core water, trenching upon state authority, including in areas of non-economic activity. *See generally United States v. Lopez*, 514 U.S. 549, 561 (1995); *United States v. Morrison*, 529 U.S. 598, 613 (2000). And for many other applications of the Proposed Rule, those waters and lands could only be regulated under a statute that sought to assert the full force of Congress' constitutional authority, such as application to the aggregated isolated waters the Proposed Rule includes on a case-by-case basis. The Supreme Court in *SWANCC* specifically held that the CWA is not such a statute. 531 U.S. at 173-74. Instead, the CWA—unlike the Proposed Rule—specifically respects the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" 33 U. S. C. § 1251(b).

* * *

The Proposed Rule unlawfully and unconstitutionally seeks to assert federal jurisdiction over local water and land use management, while making it impossible for farmers, developers and homeowners to know when they may carry on their activities without obtaining an extremely expensive federal permit. Accordingly, we urge that the Agencies withdraw the Proposed Rule.

We also urge the Agencies to meet with State officials throughout the country, so that the Agencies can better understand the careful measures these officials are taking to protect the land and water in their respective States. After undergoing that careful consultation process, the Agencies should propose a very different rule, which respects the States' primary responsibility over the lands and waters within their borders and gives farmers, developers and homeowners clear guidance as to when the CWA's requirements apply.²

² The States of Alaska, North Dakota, and South Dakota will also be submitting separate comment letters addressing the Proposed Rule. The other signatory States reserve the right to submit separate comment letters, should they determine such separate comment letters are appropriate.

Honorable Gina McCarthy and John M. McHugh

October 8, 2014

Page 13

Sincerely,



Patrick Morrisey
West Virginia Attorney General



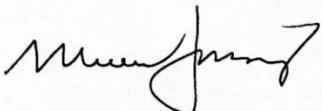
Jon Bruning
Nebraska Attorney General



E. Scott Pruitt
Oklahoma Attorney General



Luther Strange
Alabama Attorney General



Michael C. Geraghty
Alaska Attorney General



Samuel S. Olens
Georgia Attorney General



Derek Schmidt
Kansas Attorney General



James D. "Buddy" Caldwell
Louisiana Attorney General



Wayne Stenehjem
North Dakota Attorney General



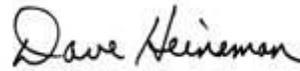
Alan Wilson
South Carolina Attorney General



Marty J. Jackley
South Dakota Attorney General



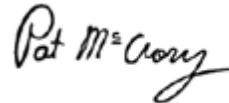
Governor Terry E. Branstad
Iowa



Governor David Heineman
Nebraska



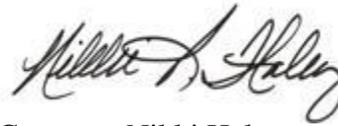
Governor Sam Brownback
Kansas



Governor Pat McCrory
North Carolina



Governor Phil Bryant
Mississippi



Governor Nikki Haley
South Carolina