Docket No. EPA-HQ-OW-2018-0149

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

and the

DEPARTMENT OF THE ARMY

on

Revised Definition of "Waters of the United States"

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 84 FED. REG. 4154 (February 14, 2019)

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Submitted Electronically (www.regulations.gov)
U.S. Environmental Protection Agency
EPA Docket Center
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Revised Definition of "Waters of the United States"; Proposed Rule; Docket No. EPA-HQ-OW-2018-0149, 84 Fed. Reg. 4154 (February 14, 2019)

Dear Sir or Madam:

Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Environmental Protection Agency's (EPA) and Department of the Army, Corps of Engineers' (Corps) (collectively, "Agencies") proposed rule seeking comment on revising the definition of "Waters of the United States."

WLF's comments focus on the need for clarity and consistency in defining the scope of waters federally regulated under the Clean Water Act (CWA). In finalizing this rule, it is important that the Agencies' definition be narrowly drawn and sufficiently clear that future administrators will not be able to adopt novel interpretations that expand the definition without resort to notice-and-comment rulemaking. WLF applauds the Agencies' unified effort to revise the current rules to implement the overall aim of the CWA: restoring and maintaining the quality of the nation's waters while respecting State and Tribal authority over their own land and water resources. The proposal is a much needed recalibration of the CWA that will establish the scope of federal regulatory authority more clearly.

I. Interests of WLF

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center with supporters throughout the United States. WLF devotes much of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal courts to urge that judicial interpretations of environmental laws strike a proper balance between environmental safety and economic well-being. *See, e.g. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014)

(challenging EPA's expansion of greenhouse-gas regulation likely to impact the entire economy); *Am. Farm Bureau Found. v. EPA*, 792 F.3d 281 (3d Cir. 2015) (challenging EPA's TMDL for the Chesapeake Bay watershed). Likewise, WLF regularly submits comments to federal regulatory agencies, including EPA, on proposed rulemakings. *See, e.g.* WLF Comment, *In re Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process*, Docket ID No. EPA-HQ-OA-2018-0107 (July 20, 2018); WLF Comment, *In re Definition of "Waters of the United States"—Recodification of Pre-existing Rules*, Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, often produces and distributes articles on a wide array of legal issues related to EPA regulation. *See, e.g.*, Samuel B. Boxerman & Ben Tannen, *EPA Seeks Stakeholder Comments On Reforming Existing Regulations*, WLF COUNSEL'S ADVISORY (Apr. 21, 2017); Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF LEGAL BACKGROUNDER (June 6, 2014).

II. 2015 Clean Water Rule

The 2015 Clean Water Rule has caused much uncertainty, as it includes many bodies of water that do not regularly flow into larger waterways. It uses expansive definitions that make it extremely difficult to identify which waters fall outside the boundaries established under the rule. And that was likely the point. Under the 2015 Rule, which purported to follow Justice Kennedy's solo concurring opinion from *Rapanos v. United States*, 547 U.S. 715, 759 (2006), wetlands and non-navigable waters fall within the scope of the Clean Water Act if they have a "significant nexus" to a traditional waterway. 547 U.S. at 779. Rather than define a clear line, the Rule proposes a case-by-case approach to determine whether a wetland falls under the scope of the CWA.

But a case-by-case approach lacks clarity and consistency. The vague term "significant nexus" permits virtually any water to be considered a "water of the United States" and thus fall within the CWA's jurisdiction. It leaves too much discretion for administrators to expand the definition and thus threatens landowners with liability for violating the CWA. Further, many critics expressed concern that the Rule imposed extreme costs but provided little or no benefit. *See* Laura Gatz, CONG. RESEARCH SERV., R45424, "WATERS OF THE UNITED STATES" (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE 5-6 (2018).

Responding to concerns over the 2015 Rule, the White House issued an Executive Order in 2017 to review the "waters of the United States" rule. Following that order, the

Agencies finalized an Applicability Date Rule that delayed the implementation of the 2015 Rule until February 26, 2020. But immediately after this ruling, environmental groups and states filed lawsuits challenging the Applicability Date Rule. This led to various U.S. District courts issuing injunctions of either the Applicability Date Rule, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018), or the 2015 Rule. *See, e.g., Georgia v. Pruitt*, No. 2:15-cv-79, 2018 U.S. Dist. LEXIS 97223 (S.D. Ga. June 8, 2018). On July 22, 2017, as the first step in this comprehensive process of revising the definition of "waters of the United States," the Agencies issued a proposed rule that would rescind the 2015 Clean Water Rule. *See* 82 Fed. Reg. 34889.

Due to the court actions, the 2015 Clean Water Rule is in effect in 22 states but enjoined in 28 states. The proposed rule will ensure that all states follow the same definition of "waters of the United States."

III. Proposed Rule

As mentioned above, the 2015 Clean Water Rule is in effect in 22 states but enjoined in 28 states. This is an untenable situation that the proposed rule seeks to remedy. The Agencies' proposal is predictable and more easily implementable, limiting "waters of the United States" to traditional navigable waters and those that are physically and meaningfully connected to traditional navigable waters. Specifically, the proposed rule outlines six clear categories of waters that would be considered "waters of the United States":

1. Traditional navigable waters (large rivers and lakes, tidal waters, and the territorial seas used in interstate or foreign commerce);
2. Tributaries (rivers and streams that flow to traditional navigable waters);
3. Certain ditches (where they are traditional navigable waters or subject to the ebb and flow of the tide or where they satisfy conditions of the tributary definition);
4. Certain lakes and ponds (where they are traditional navigable waters, where they contribute perennial or intermittent flow to a traditional navigable water either directly, though other "waters of the United States," or through other non-jurisdictional surface waters so long as those waters convey perennial or intermittent flow downstream, or where they are flooded by a "water of the United States" in a typical year");
5. Impoundments; and
6. Adjacent wetlands (physically touching other jurisdictional waters).

The proposal also delineates what is not a "water of the United States." This includes such waters as ephemeral features, groundwater, ditches that do not meet the proposed conditions, including most farm and roadside ditches, prior converted cropland, storm water control features, wastewater recycling structures, groundwater recharge basis, and waste treatment systems.

IV. Supreme Court Precedent

The Agencies' proposal calls for a much narrower definition of "waters of the United States" that reflects Justice Scalia's plurality opinion from *Rapanos* as well as earlier decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

In *SWANCC*, the Court held that "isolated ponds, some only seasonal" are not "'navigable waters' [just] because they serve as a habitat for migratory birds." 531 U.S. at 171-72. The Court found that attempts to expand the definition of "waters of the United States" beyond traditional navigable waters "raised significant constitutional questions." *Id.* at 177. So isolated, completely intrastate ponds with no connection to navigable waters are not subject to the CWA. While proponents of an expansive definition of "waters of the United States" attempt to limit *SWANCC*'s holding to cases involving the Migratory Bird Rule, it applies beyond that and helped frame the Court's decision in *Rapanos.*

Rapanos involved four Michigan wetlands located near man-made ditches that eventually emptied into traditional navigable waters. 547 U.S. at 762-63. The United States brought civil enforcement proceedings against the petitioners, who had backfilled three of the areas without a permit. *Id.* The district court found federal jurisdiction over the wetlands because they were adjacent to "waters of the United States" and held petitioners liable for CWA violations. *Id.* Affirming, the Sixth Circuit justified CWA jurisdiction based on the sites' hydrologic connections to the nearby ditches or drains, or to more remote navigable waters. *Id.*

In a fractured decision, four justices—led by Justice Scalia—voted for a narrow interpretation of CWA jurisdiction, the interpretation now adopted by the Agencies' proposed rule. Every justice agreed that traditional navigable waters (*i.e.*, waters that are navigable in fact and waters that could be made navigable) are "jurisdictional"—that is, they are waters that will *always* be deemed subject to CWA jurisdiction.

Justice Scalia's plurality adopted a jurisdictional test under which "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers,

and lakes" connected to navigable-in-fact waters are subject to CWA jurisdiction. *Id.* at 739. Although these bodies of water can be purely intrastate, they do "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* Likewise, "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 clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and are covered by the [CWA]." *Id.* at 742. Such wetlands must be "as a practical matter indistinguishable" from the relatively permanent body of water, and that body of water must itself be "connected to traditional interstate navigable waters." Id. at 742, 755. This definition properly serves as the structure for the Agencies' proposed rule.

V. The Proposed Rule Best Furthers the Goals of the CWA

In *Rapanos*, Justice Scalia discussed the difficulty with clearly defining the term "navigable water" and thus "waters of the United States." Because of that difficulty, "the Corps must necessarily choose some point at which water ends and land begins." 547 U.S. at 725 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985)). So in *Riverside Bayview*, the Court upheld the Corps' interpretation that "waters of the United States" included "wetlands that 'actually abut[ted] on' traditional navigable waters." *Id.* (quoting *Riverside Bayview*, 474 U.S. at 135). But in later years, "the Corps adopted increasingly broad interpretations of its own regulations under the Act." *Id.* While Scalia noted that the CWA authorizes federal jurisdiction over more than just traditional navigable waters, "clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that 'the waters of the United States' … cannot bear the expansive meaning that the Corps would give it." *Id.* at 731-32.

The proposed rule echoes the view that the Agencies do have the power under the CWA to regulate beyond traditional navigable waters, but "must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction." 84 Fed. Reg. 4168. But previous administrations have taken too much control by designating seemingly all water as "navigable" without providing a basis for it.

The proposed rule reins in previous expansive definitions and closely tracks Justice Scalia's opinion in *Rapanos*. This will advance the aims of the CWA, which seeks to address "longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law." *Rapanos* . *Rapanos* sought to balance the need to define "waters of the United States" to mean more than just traditional navigable waters, *id.* at 731, with the need to eliminate ambiguity. Justice Scalia settled on including "relatively permanent, standing or continuous flowing bodies of water" and wetlands that "actually abut" traditional navigable waters. *Id.* at

739-40. The proposal achieves this balance and should eliminate much of the confusion caused by the 2015 Rule and previous interpretations.

The proposal reflects "the ordinary meaning of the term 'waters,' such as oceans, rivers, and lakes, as opposed to … ephemeral geographic features that are dry almost all of the year, as well as nonnavigable, isolated waters as the 2015 Rule would regulate." 84 Fed. Reg. at 4196. It also follows the Supreme Court's definitions of "tributary" and "adjacent wetlands." By drafting the definition in this way, the Agencies are more closely aligned with the language of the CWA and the Supreme Court.

And importantly, it establishes a clear distinction between federal waters and those subject to the sole control of the States and Tribes. Over the years, the federal government "has shown its willingness to exercise [jurisdiction] with the scope of discretion that would befit a local zoning board." *Rapanos*, 547 U.S. at 738.

The Supreme Court has recognized the States' "traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Despite concerns of various environmental groups, the Agencies make clear that the proposed rule does not determine which waters warrant environmental protection. Rather, it determines those waters that are within the jurisdiction of the CWA and those that "States and Tribes are free to manage under their independent authorities." 84 Fed. Reg. at 4169. The proposal gives authority back to States and Tribes to regulate waters within their borders. They are in the best position to regulate waters within their borders, as they know the needs of their citizens and can properly address pollution issues affecting them. The new definition should alleviate that confusion and provide clarity to landowners so they understand whether a project on their property would require a federal permit.

When finalizing the rule, it is important that the Agencies provide very clear meanings so as to prevent spurious reinterpretation whenever an administrator seeks to regulate a body of water. As the Agencies note, a straightforward regulation will protect the nation's navigable waters while reducing barriers to business development and helping sustain economic growth.

VI. Conclusion

In sum, WLF applauds the Agencies' efforts and agrees with the revised definition of "waters of the United States." One of the current Administration's main goals has been rolling back years of overregulation. The proposed rule clearly defines what is under federal jurisdiction, and gives back the power to States and Tribes to regulate within their borders to best meet the needs of their citizens. This will alleviate confusion and provide clarity to landowners.

Sincerely,

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