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September 27, 2017

The Honorable Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

The Honorable Douglas Lamont  
Deputy Assistant Secretary of the Army,  
performing the duties of the  
Assistant Secretary of the Army for Civil Works  
U.S. Department of the Army  
108 Army Pentagon  
Washington, DC 20310

Submitted via [regulations.gov](http://regulations.gov)

**Re: Comments of the States of West Virginia, Wisconsin, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah, and the Commonwealth of Kentucky on the proposed rule entitled *Definition of “Waters of the United States” – Recodification of Pre-existing Rules*, 82 Fed. Reg. 34, 899 (July 27, 2017) (Docket Nos. EPA-HQ-OW-2017-0203; FRL-9962-34-OW).**

Dear Administrator Pruitt and Mr. Douglas Lamont:

The undersigned States write to express our support for the Proposed Rule issued by the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) (collectively “the Agencies”) entitled “Definition of ‘Waters of the United States’— Recodification of Pre-existing Rules,” 82 Fed. Reg. 34,899 (July 27, 2017).

The Proposed Rule rescinds the 2015 definition of “waters of the United States” (“2015 WOTUS Rule” or “Rule”) and recodifies the pre-existing rules that are currently in effect due to orders of the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the District of North Dakota, staying the 2015 WOTUS Rule.

The undersigned States support the Proposed Rule. The 2015 WOTUS Rule violates the Clean Water Act, the Administrative Procedure Act, the National Environmental Policy Act, and the U.S. Constitution, and conflicts with decisions of the U.S. Supreme Court. The 2015 WOTUS Rule also did not give sufficient consideration to the extent to which States protect water resources outside the CWA’s jurisdiction under the CWA’s regime of cooperative federalism. As a result, the Agencies improperly expanded their own jurisdiction under the 2015 WOTUS Rule, to the detriment of the States, and placed onerous permitting requirements on landowners who had no expectation that their properties contained “waters of the United States.”

For these reasons, and for others discussed below, we urge the Agencies to adopt the Proposed Rule and rescind the 2015 WOTUS Rule. The undersigned also support the Agencies’ proposal to recodify the pre-existing rules while the Agencies complete their review in order to provide consistency in the event that the Supreme Court decides that the Sixth Circuit did not have jurisdiction and its nationwide stay expires. At the same time, the States believe the pre-existing rules are entirely too broad and urge the Agencies to move with dispatch to propose and then adopt a narrowly confined definition of the “waters of the United States,” which respects the States’ authority over local water and land features.

## **BACKGROUND**

### **I. The Clean Water Act**

The Clean Water Act of 1972 (“CWA”) granted the Agencies regulatory authority over “navigable waters,” defined as “waters of the United States.” 33 U.S.C. §§ 1344, 1362(7). Anyone who wishes to discharge a covered “pollutant” into a “water of the United States” must first obtain a permit from EPA or the Corps. 33 U.S.C. §§ 1311(a), 1344, 1362(12). Under the CWA, pollutants include not just traditional contaminants but also “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 permit can take years and cost tens or hundreds of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344; *Rapanos*, 547 U.S. at 721. And the fines for discharging into “waters of the United States” without a permit can subject a farmer, developer, or homeowner to criminal and civil penalties. 33 U.S.C. §§ 1311, 1319, 1365.

Congress also instructed the Agencies 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). Part of that instruction is recognizing the extent to which States protect waters within their borders that are not subject to CWA jurisdiction. Waters that fall outside the scope of the CWA remain subject to regulation through local laws and regulations.

*See, e.g.*, W. Va. Code §§ 22-26-3, 22-1-1 to -15; N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.*

## II. Supreme Court Precedent

Before the CWA was enacted, the Supreme Court “had interpreted the phrase ‘navigable waters of the United States’ in the [CWA’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)).

In 1985, following enactment of the CWA, the Supreme Court upheld a portion of regulations that asserted jurisdiction over wetlands that “actually abut[ted] on” traditional navigable waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). But since then, the Court has issued two significant opinions rejecting the Agencies’ assertions of broad federal authority. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), the Supreme Court rejected the Corps’ asserted jurisdiction over waters “[w]hich are or would be used as habitat” by migratory birds. The Court held that the Corps exceeded its authority by attempting to reach “nonnavigable, isolated, intrastate waters,” such as seasonal ponds. The Court explained that the Corps’ interpretation “invoke[d] the outer limits of Congress’ power” and that such a broad assumption of power requires clear congressional authorization. *Id.* at 172. The Court also explained that the Corps’ interpretation would “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* at 173. The Court did not find that Congress had authorized such encroachment. To the contrary, Congress chose to “‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .’” *Id.* (quoting 33 U.S.C. § 1251(b)).

Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court rejected the Corps’ authority over intrastate wetlands that are not significantly connected to navigable-in-fact waters. Justice Scalia wrote a plurality opinion explaining that the term “waters of the United States” extended only to “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes,’” *id.* at 739 (Scalia, J., plurality) (quoting Webster’s New International Dictionary 2882 (2d ed. 1954)), and “wetlands with a continuous surface connection to” those waters, *id.* at 742. In contrast, “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage rainfall” are outside the CWA’s jurisdiction. *Id.* at 739.

Justice Kennedy wrote separately for himself, concurring in the judgment. Justice Kennedy explained that in his view only “waters that are or were navigable in fact or that could reasonably be so made” and waters with a “significant nexus” to those navigable-in-fact waters qualify as “waters of the United States.” *Id.* at 759. A significant nexus exists, in Justice

Kennedy’s view, where the waters “alone or in combination with similarly situated lands in the region[] significantly affect the chemical, physical, and biological integrity of” navigable waters. *Id.* at 780. The CWA does not include waters with a “speculative or insubstantial” nexus to navigable waters, such as remote wetlands. *Id.* at 776. Thus, Justice Kennedy rejected a definition that would assert jurisdiction over all “wetlands (however remote)” or all “continuously flowing stream[s] (however small).” *Id.* at 776. Justice Kennedy also explained that “[t]he merest trickle, [even] if continuous,” is insufficient to establish a significant nexus. *Id.* at 769.

### III. The 2015 WOTUS Rule

In June 2015, the Agencies issued the final 2015 WOTUS Rule. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,053 (June 29, 2015). The 2015 WOTUS Rule asserted sweeping jurisdiction over usually dry channels occasionally carrying “[t]he merest trickle[s]” into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The 2015 WOTUS Rule also covers waters merely because they are somewhat near such a dry channel and land features that connect to navigable waters only, if ever, after a once-in-a-century rainstorm.

The 2015 WOTUS Rule categorized “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce” and “[a]ll interstate waters, including interstate wetlands” and “the territorial seas” as primary waters. 33 C.F.R. § 328.3(a)(1)–(3). Then, the Rule asserts jurisdiction over three categories of waters based on a purported connection to primary waters.

*First*, the Rule claims per se jurisdiction over “[a]ll tributaries,” 33 C.F.R. § 328.3(a)(5), defined as any “water that contributes flow, either directly or through another water” to an interstate water that is “characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark,” *id.* § 328.3(c)(3). *Second*, the Agencies assert automatic jurisdiction over all waters “adjacent” to interstate waters and their tributaries, including: (1) all waters any part of which are within 100 feet of the ordinary high water mark of an interstate water or tributary; (2) all waters any part of which are within 1,500 feet of the ordinary high water mark of a primary water or tributary and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high tide line of a primary water. *Id.* § 328.3(c)(2). *Third*, the Rule allows the Agencies to assert jurisdiction over any water on a case-by-case basis that is at least partially within the 100-year floodplain of a primary water and at least partially within 4,000 feet of the high tide line or ordinary high water mark of a primary water or tributary so long as the Agencies can find a significant nexus with a primary water. *Id.* § 328.3(a)(8).

Our States, among others, filed suit because the WOTUS Rule violates the Clean Water Act (“CWA”), the Administrative Procedure Act (“APA”), and the U.S. Constitution.<sup>1</sup> The

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<sup>1</sup> See *Murray Energy Corp. v. EPA*, No. 15-3887 (and consolidated cases) (6th Cir.); *North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D. filed June 29, 2015); *Ohio v. U.S. Army Corps of*

WOTUS Rule violates the CWA under either the *Rapanos* plurality or Justice Kennedy's concurrence. And even if the WOTUS Rule were not prohibited by the Supreme Court's clear directives, it is unlawful because it is not clearly permitted by the language of the CWA. As the Supreme Court held in *SWANCC*, federal regulation of vast numbers of local land and water features traditionally regulated by the States requires a clear statement from Congress. Moreover, the Agencies adopted the WOTUS Rule in violation of the Administrative Procedure Act by building the rule around five distance-based components and one unduly narrow exclusion never even arguably presented in the Agencies' proposed rule and lacking record support. Finally, the WOTUS Rule violates the Constitution by exceeding Congress's authority under the Commerce Clause and intruding on the States' reserved authority under the Tenth Amendment.

Reflecting the strength of these challenges, the WOTUS Rule has been stayed by two federal courts. The day before the WOTUS Rule's effective date, the U.S. District Court for the District of North Dakota stayed implementation of the Rule in thirteen plaintiff-States pending judicial review of the Rule. *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D. N.D. 2015). Then on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed implementation of the WOTUS Rule nationwide, finding that the Rule was likely unlawful. *In re EPA*, 803 F.3d 804 (6th Cir. 2015).

The Sixth Circuit subsequently decided that it had jurisdiction to consider challenges to the WOTUS Rule in the first instance under 33 U.S.C. § 1369(b)(1). *In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of the U.S.*, 817 F.3d 261 (6th Cir. 2016). Then, in September 2016, the National Association of Manufacturers filed a petition for a writ of certiorari in the United States Supreme Court appealing that decision. The U.S. Supreme Court granted the petition. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 137 S. Ct. 811 (Jan. 13, 2017). The case is scheduled for oral argument on October 11, 2017.

In February 2017, the President issued an Executive Order instructing the Agencies to review the WOTUS Rule and issue for notice and comment a proposed rule revising or rescinding the rule, as appropriate. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Order further instructs the Agencies to consider interpreting the term "navigable waters" as defined in 33 U.S.C. § 1362(7) in the Clean Water Act consistent with the plurality opinion of Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The Agencies have adopted a two-step approach for implementing the Executive Order: (1) rescinding the 2015 WOTUS Rule and re-codifying the pre-existing rules; and (2) issuing a new rule that takes into account the plurality opinion written by Justice Scalia in *Rapanos*.

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*Eng'rs*, No. 2:15-cv-2467 (S.D. Ohio filed June 29, 2015); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex. filed June 29, 2015); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga. filed June 30, 2015); *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Okla. filed July 8, 2015).

## DISCUSSION

The Agencies have the authority to rescind the 2015 WOTUS Rule and ought to do so. The U.S. Supreme Court has ruled that agencies may change policy direction so long as the new policy is permissible under the statute and supported by good reasons. The agency need not demonstrate that its new policy is superior to the policy that it is replacing.

Here, the Agencies have provided good reasons to justify their decision to rescind the 2015 WOTUS Rule. The undersigned States support the Agencies' decision for the additional reason that the 2015 WOTUS Rule violates the Clean Water Act ("CWA"), the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and the U.S. Constitution. We urge the Agencies to adopt the Proposed Rule rescinding the 2015 WOTUS Rule and reinstating the pre-existing rules.

### **I. The Agencies Have Authority To Rescind The 2015 WOTUS Rule.**

An agency can change policy so long as it can show "that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In *Fox Television*, the Supreme Court rejected the argument that an agency must meet a higher standard for rescinding a previous regulation than is required for adopting a new rule. *Id.* at 514. The Court explained that the Administrative Procedure Act, which instructs courts to "'hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary [or] capricious,'" does not distinguish "between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 515.

There are only two exceptions to this general rule, neither of which apply here. *First*, an agency must describe its new policy in greater detail if the policy is based on factual findings that contradict those that supported the old policy. *Fox*, 556 U.S. at 515. EPA has not claimed to rely on new factual findings in the Proposed Rule. *Second*, an agency must explain its decision in more detail if the prior policy engendered serious reliance interests. *Id.* The 2015 WOTUS Rule could not have engendered serious reliance interests because the rule was only in effect for six weeks in most States and never took effect in the remaining thirteen States.

Accordingly, the Agencies need only make the same showing necessary for adopting a regulation in the first instance—that the regulation is permissible under the statute and not arbitrary or capricious. Under the arbitrary or capricious standard, an agency is only required to show that the new policy is permissible under the statute and "that there are good reasons for the new policy." *Id.* The agency can revise its policy based on a reevaluation of policy priorities. "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the

administration.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) (Rehnquist, J., concurring in part and dissenting in part).

The Agencies’ decision to rescind the 2015 WOTUS Rule is not arbitrary and capricious. The Agencies recognize that they are changing policy based on their “balancing the objectives, goals, and policies of the CWA.” 82 Fed. Reg. 34,902. The Agencies explain that in the 2015 WOTUS Rule, they did not properly balance those objectives. *Id.* Specifically, the Agencies failed to consider the extent to which States protect water resources not subject to CWA jurisdiction. *Id.* Section 101(b) of the CWA instructs the Agencies to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b). The Agencies’ explanation is sufficient to establish “good reasons” for a change in policy. Although we agree that in the 2015 WOTUS Rule the Agencies failed to appropriately consider the extent to which States regulate waters and lands outside of CWA jurisdiction, it is sufficient to survive an arbitrary and capricious challenge that the Agencies believe the new policy choice to be better.

## **II. The Agencies Should Rescind The 2015 WOTUS Rule Because It Is Unlawful.**

For the reasons articulated below, we not only believe that the Agencies have authority to rescind the 2015 WOTUS Rule, but that the law requires them to do so. The 2015 WOTUS Rule violates the CWA, the Administrative Procedure Act, the National Environmental Policy Act, and the U.S. Constitution. Accordingly, the Agencies should adopt the Proposed Rule and repeal the 2015 WOTUS Rule.

### **A. The 2015 WOTUS Rule Violates the Clean Water Act.**

Agencies can only exercise power that Congress has delegated to them. In only the last fifteen years, the Supreme Court has twice rebuked the Agencies for regulating beyond the boundaries set by Congress in the CWA. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001). With the WOTUS Rule, the Agencies have defied those boundaries once again. In fact, the Rule regulates the very same waters the Court held fall outside the scope of the CWA in *SWANCC* and *Rapanos*.

The Rule also fails the test set out in the *Rapanos* plurality opinion because it includes isolated tributaries, non-adjacent waters misleadingly termed “adjacent,” and waters on a case-by-case basis that also lack a surface connection to relatively permanent navigable waters. The States believe the plurality approach is the preferred approach to CWA jurisdiction and plan to explain the reasons for that approach in the anticipated second rulemaking.

Even on its own terms, the 2015 WOTUS Rule fails the Kennedy concurrence approach. The Agencies claimed to rely exclusively on Justice Kennedy’s *Rapanos* concurrence, but the Rule plainly violates that approach. For example, the Rule’s tributaries category sweeps in

usually dry channels that at most occasionally carry the “[t]he merest trickle[s]” into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The adjacency category covers waters simply because they are somewhat near a remote “tributary,” which are the *very same* waters that Justice Kennedy specifically explained fell outside of the CWA. *See id.* This category also asserts jurisdiction over land features that might link to navigable waters, if at all, only during once-in-a-century rainstorms, which exceeds any reasonable notion of a “significant nexus.” And the Rule’s case-by-case waters category sweeps in—among many other features—the very same waters that the Supreme Court held were not jurisdictional in *SWANCC*, a decision that Justice Kennedy relied upon heavily.

Even if the Rule were not prohibited by the Supreme Court’s clear directives on the meaning of the phrase “waters of the United States,” the Rule’s assertion of broad authority at or beyond constitutional limits requires clear congressional authorization. The Supreme Court in *SWANCC* held that the assertion of federal authority in that case was unlawful, in part, to avoid serious constitutional concerns. These concerns apply with much greater urgency to the Rule, which covers not only the very same waters at issue in *SWANCC*, but innumerable other local land and water features, the regulation of which is a core sovereign function of the States.

#### **B. The 2015 WOTUS Rule Violates The Administrative Procedure Act.**

The 2015 WOTUS Rule also violates the Administrative Procedure Act, and in particular, the principle that any standard announced in a final rule must be a “logical outgrowth” of the proposal, in order to provide interested parties with an adequate opportunity for notice and comment. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 160 (2007). The Agencies unlawfully built the 2015 WOTUS Rule around five distance-based components that are not even arguably a “logical outgrowth” of the proposal. The Rule’s adjacency and case-by-case waters categories are oriented around several distance-based components that were nowhere mentioned in the proposed rule. As a result, the Agencies were not able to identify even a single comment, out of more than a million, that addressed any of the components. This sort of procedural failure would be unacceptable as to any agency rule, but it is particularly egregious given the context of this rulemaking, which defines how millions of acres of local land and water features will be regulated.

The Agencies’ failure to comply with the APA’s notice-and-comment requirements contributed to another APA violation: the failure to offer record support for the Rule. The five distance-based components and the unduly narrow exclusion lack *any* record support, forcing the Agencies to rely upon vague assertions of “reasonable and practical” distinctions and unspecified “experience” to justify their inclusion. 80 Fed. Reg. at 37,085-91. These conclusory statements are insufficient to justify the Rule.

#### **C. The 2015 WOTUS Rule Violates The National Environmental Policy Act.**

The Rule is also unlawful and should be withdrawn because the Corps did not comply with the requirements of the National Environmental Policy Act (“NEPA”) in adopting the Rule.

Specifically, the Corps failed to complete a thorough analysis of the Rule's environmental and socioeconomic effects, the Rule's effects on the human environment, and possible alternatives to the Rule as required by NEPA.

The Corps violated NEPA by failing to prepare an Environmental Impact Statement ("EIS") analyzing the environmental and socioeconomic effects of the Rule. As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily triggered NEPA's EIS requirement.

The Corps relied on a wholly inadequate Environmental Assessment ("EA") to determine that the Final Rule will not have significant effects on the human environment. The EA was devoid of analysis of key factors that, if considered, would have prompted any reasonable agency to prepare an EIS.

The Corps' alternatives analysis was similarly defective. The Corps analyzed only two options: the 2015 WOTUS Rule and the existing post-*Rapanos* regulatory regime. The Corps ignored reasonable and feasible alternatives, including several raised by the States during the public comment period on the Proposed Rule. By narrowing the range of alternatives considered, the Corps narrowed its scope of review, depriving the public and the States of meaningful participation.

#### **D. The 2015 WOTUS Rule Violates The Constitution.**

The Agencies should withdraw the 2015 WOTUS Rule because it violates the U.S. Constitution in three principal ways.

*First*, the Rule exceeds Congress's constitutional authority under the Commerce Clause because it assigns the federal government jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. *See SWANCC*, 531 U.S. at 173.

*Second*, it intrudes upon the States' sovereign interests in regulating their land and water resources in violation of the Tenth Amendment, contrary to the core federalism principles also reflected in the CWA. *See* 33 U.S.C. § 1251(b). The Rule asserts jurisdiction over local land and water features that have only a remote connection, if any, to navigable-in-fact waters, turning the Agencies into a "de facto" federal "zoning board." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). This imposes significant burdens on the States, and deprives the States of their sovereign land-use authority.

*Third*, the Rule violates the Due Process Clause because it is unconstitutionally vague. The Rule defines jurisdictional tributaries based on the presence of ordinary high water marks and other difficult-to-identify features, which are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application," *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007). Similarly, the Rule allows the Agencies to assert jurisdiction over waters on a case-by-case basis without providing

sufficient guidance for making such a determination, making it impossible for ordinary citizens to know when their lands will be swept within the CWA on an enforcement agent's whim.

### **III. Re-Codifying The Pre-existing Rules Is A Reasonable Way To Provide Regulatory Consistency.**

The Agencies have recognized the need to provide regulatory consistency and clarity while they more fully consider the role of States in regulating water resources outside of the CWA's jurisdiction. The Proposed Rule would recodify the pre-existing rules that were in effect for many years before the 2015 WOTUS Rule and for the vast majority of time during the litigation concerning the Rule. That proposal maintains the status quo and provides nationwide consistency should the Sixth Circuit's stay be dissolved.

Implementation of the 2015 WOTUS Rule is currently stayed nationwide by orders of the Sixth Circuit and the North Dakota district court. The Supreme Court's resolution of the question of whether the Sixth Circuit had original jurisdiction could alter that situation. Were the Supreme Court to decide that the Sixth Circuit lacks original jurisdiction over the challenges to the rule, the Sixth Circuit case would be dismissed and the stay would expire. That would leave the 2015 WOTUS Rule in place in all States except for the thirteen States covered by the North Dakota injunction, requiring each State to seek preliminary injunctions in district court. The States agree with the Agencies that such a situation would provide unnecessary confusion. Instead, the Proposed Rule would provide a consistent nationwide standard for determining CWA jurisdiction in the interim period.

Although the pre-existing rules are not the States' preferred approach to CWA jurisdiction, they provide needed consistency while the Agencies reconsider the Rule. At the appropriate time, the States plan to participate in the anticipated second rulemaking to argue that the Agencies must adopt a narrower interpretation of the term "waters of the United States" than is currently embodied by agency regulations.

\* \* \*

We urge the Agencies to adopt the Proposed Rule rescinding the unlawful 2015 WOTUS Rule and re-codifying the pre-existing rules. We believe that the Agencies should also move forward quickly with proposing a replacement rule, which takes an appropriate view of the term "waters of the United States" and thus respects the States' authority over local water and land features.

Honorable Scott Pruitt and Douglas Lamont  
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Sincerely,



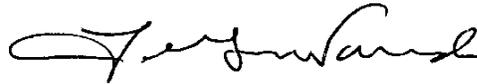
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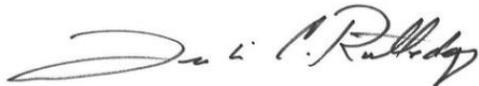
Derek Schmidt  
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Andy Beshear  
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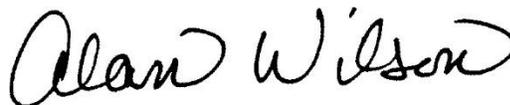
Joshua D. Hawley  
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Mike Hunter  
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Montana Attorney General



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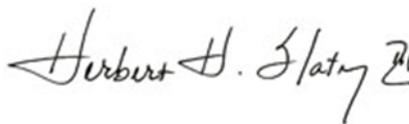
Doug Peterson  
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South Dakota Attorney General



Adam Paul Laxalt  
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Herbert H. Slatery, III  
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Wayne Stenehjem  
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Ken Paxton  
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A handwritten signature in black ink, appearing to read "Sean D. Reyes". The signature is fluid and cursive, with the first name "Sean" and last name "Reyes" clearly distinguishable.

Sean D. Reyes

Utah Attorney General