COMMENTS BY ENVIRONMENT AMERICA AND ITS STATE AFFILIATES ON THE "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES.'" 84 FED. REG. 4,154, *ET SEQ.*, FEBRUARY 14, 2019

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

Charles C. Caldart
National Environmental Law Center
1402 Third Avenue, Suite 618
Seattle, WA 98125
(206) 568-2853
cccnelc@aol.com

Interests of the Commenters

Environment America is a nonprofit corporation, incorporated in the State of Colorado, that has 29 state affiliates[1] and 182,805 individual members nationwide. Members of Environment America are home owners, renters, students, business owners and operators, elected national, state, and local officials, and other residents of the United States who value clean water for recreational, business, aesthetic, economic, health-related, and other purposes. Environment America and its predecessor organizations have worked to help implement and enforce the federal Clean Water Act ("CWA") since the 1970s.

[1] The state affiliates are: Environment Arizona, Environment California, Environment Colorado, Environment Connecticut, Environment Florida, Environment Georgia, Environment Illinois, Environment Iowa, Environment Maine, Environment Maryland, Environment Massachusetts, Environment Michigan, Environment Minnesota, Environment Missouri, Environment Montana, Environment Nevada, Environment New Hampshire, Environment New Jersey, Environment New Mexico, Environment New York, Environment North Carolina, Environment Ohio, Environment Oregon, PennEnvironment, Environment Rhode Island, Environment Texas, Environment Virginia, Environment Washington, Wisconsin Environment

Comments on the Proposed Rule

The approach taken in the proposed rule by the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (collectively, "the agencies") is unlawful and illogical because it (1) intentionally misreads and misapplies the *Rapanos* decision of the Supreme Court; (2) all but ignores the comprehensive science report on which the current rule is based; (3) prioritizes protection of state authority over the overriding federal purposes of the CWA; and (4) prioritizes purported ease of implementation over faithfulness to the CWA and the underlying science. As a result, the proposed rule would leave at least 18% of the nation's streams and at least 51% of the nation's wetlands without coverage under the Act. As the Preamble grudgingly acknowledges, "narrowing the scope of CWA regulatory jurisdiction over waters may result in a reduction in the ecosystem services provided by some waters, and as a result, some entities [including some business sectors] may be adversely impacted." 84 Fed. Reg. at 4,201.

1. The Agencies Misread and Misapply Controlling Supreme Court and Circuit Court Authority.

(a) Improper Reliance on the *Rapanos* Plurality

A fundamental legal flaw that permeates the entire proposed rule is its deference to the four-justice plurality opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006), and its concomitant derogation of the opinions of the five justices of the court who did not join that opinion. *See*, *e.g.*, 84 Fed. Reg. at 4,174 ("the agencies are proposing a definition of 'tributary' that is consistent with the *Rapanos* plurality's position that 'the waters of the United States include only relatively permanent, standing, or flowing bodies of waters . . . as opposed to ordinarily dry channels . . . or ephemeral flows of water.'') (second internal quotes omitted); 4,175 ("The proposed requirement that a tributary be connected to a traditional navigable water by perennial or intermittent flow also reflects the plurality's description of a 'wate[r] of the United States' as '*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters.') (second internal quotes omitted); 4,180 (noting that a particular position was selected on the ground that it "adheres more closely to the language of the Act and the positions articulated by the plurality opinion in *Rapanos*"); 4,183 ("This proposed

requirement is informed by *Rapanos* wherein the plurality rejected the Federal government's hydrologic connection theory in deciding that the phrase 'the waters of the United States' 'cannot bear the expansive meaning that the Corps would give it,' and challenged the notion that 'even the most insubstantial hydrologic connection may be held to constitute a significant nexus.' It also reflects the plurality's description of a 'wate[r] of the United States' as '*i.e.*, a relatively permanent body of water *connected to* traditional interstate navigable waters.'''') (citations and second internal quotes omitted); 4,196 ("The agencies believe that this proposal is more consistent with *Rapanos* than the 2015 Rule [because it] reflects the key concepts in the plurality opinion that limited jurisdiction to relatively permanent waters and wetlands with a continuous surface connection to those waters.").

Indeed, the Preamble to the proposed rule ("Preamble") does not even acknowledge, much less discuss, Justice Stevens' dissenting opinion, which was signed by four justices, and which, together with Justice Kennedy's concurrence, makes the plurality opinion the *minority* opinion of the Court. In explaining their reliance on the plurality opinion, the agencies note that they "do not think that the opinion of a single justice [here Justice Kennedy] in a complex case should be the primary determinant of federal jurisdiction over potentially large swaths of aquatic resources." 84 Fed. Reg. at 4,196. Yet the agencies do not explain why they believe it preferable to construct a rule that would in many instances be endorsed by only four members of the *Rapanos* court instead of constructing a rule, consistent with Justice Kennedy's concurrence, that would be endorsed by a five-justice majority of that court.

The agencies' approach runs counter to the law. In the 13 years since the *Rapanos* decision, the federal circuit courts addressing the issue have held either that Justice Kennedy's concurring opinion alone controls (because the four dissenting justices in *Rapanos* would also find jurisdiction where Justice Kennedy did), or that CWA jurisdiction can be satisfied if *either* Justice Kennedy's test *or* the plurality's test is satisfied. This result is consistent with the observation from Justice Stevens' dissent that "all four Justices who have joined this [dissenting] opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied." *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

Thus, the First, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that the *Rapanos* plurality does not control CWA jurisdiction. *See United States v. Agosto-Vega*, 617 F.3d 541, 551 (1st Cir. 2010) (U.S. may properly assert jurisdiction over a surface water if it meets either Kennedy's standard or the plurality standard (citing *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006)); *United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011) ("[T]he CWA is applicable to wetlands that meet either the test laid out by the plurality or by Justice Kennedy in *Rapanos*."); *United States v. Cundiff*, 555 F.3d 200, 208-09 (6th Cir. 2009) (finding jurisdiction where both Justice Kennedy's "significant nexus" test and the plurality's test were met, but noting that the First Circuit's opinion in *Johnson*, *supra*, finding jurisdiction where either test is met, is "thoughtful" and may be appropriate for future cases); *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724-25 (7th Cir. 2006) (Justice Kennedy's concurrence controls); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) ("[W]e join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test."); *N. Cal. River Watch v. City of Healdsburg,* 496 F.3d 993, 999-1000 (9th Cir.2007) (Justice Kennedy's concurrence controls); *United States v. Robison*, 505 F.3d 1208, 1219-21 (11th Cir. 2007) ("Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*").

As the Sixth Circuit noted in *Cundiff*, the guidance given by the Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977), on interpreting decisions with multiple opinions is inapposite to *Rapanos*, because neither the plurality opinion nor Justice Kennedy's opinion concurring in the judgment is a subset of the other. *See* 555 F.3d at 209 ("[W]hen 'one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic.' Specifically, '*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions.'" (quoting *King v. Palmer,* 950 F.2d 771, 782 (D.C.Cir.1991) (en banc)).

> Indeed, there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's view. *See Rapanos,* 547 U.S. at 756 (Scalia, J., plurality opinion) ('[Justice Kennedy's] test simply

> rewrites the statute.'); *id.* at 778 (Kennedy, J., concurring) ('[T]he plurality reads nonexistent requirements into the Act.').

Cundiff, 555 F.3d at 209.

The agencies appear to have recognized in the proposed rule that reliance on the plurality's opinion to the exclusion of all other approaches would not be defensible, and thus appears to have attempted to strike a form of "balance" between the plurality opinion and Justice Kennedy's opinion. In effect, the proposed rule represents something of a compromise between the two opinions. Most notably, the proposed rule would grant jurisdiction to some wetlands, and to some intermittent streams, that would not meet the plurality's narrower test. However, such a "compromise" cannot be justified under the controlling legal authority; the proposed rule would exclude from coverage numerous wetlands, streams, and other waters that come within Justice Kennedy's "significant nexus" test, and thus would deprive many waters of the protection afforded to them by Congress under the CWA.

(b) Misapplication of Justice Kennedy's Concurrence

Even when it purports to apply Justice Kennedy's concurrence, the proposed rule often misinterprets the reasoning and scope of that opinion.

(i) Wetlands: The agencies note that the proposed rule addresses "Justice Kennedy's concern with respect to regulation of wetlands adjacent to 'drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it,'" 84 Fed. Reg. at 4,196 (citation omitted). This is true. But the proposed rule does not address his concern that the *Rapanos* plurality was ignoring the "significant nexus" principle articulated by the court in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 167, 172 (2001) ("SWANCC"). A succinct summary of Justice Kennedy's position on wetlands is found in his *Rapanos* concurrence:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' 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.'

547 U.S. at 780 (Kennedy, J., concurring). The proposed rule on wetlands, which limits jurisdiction to those wetlands with a hydrologic surface connection to more traditional navigable waters, fails to incorporate these principles. While it may well exclude some wetlands whose effect on surface water quality are "speculative or insubstantial," it also excludes numerous wetlands whose effect is direct and substantial. Wetlands with an underground hydrologic connection to navigable surface waters, for example, often have a pronounced effect on surface water quality, but would be excluded under the proposed rule.

The Preamble attempts to skirt this issue by noting Justice Kennedy's invitation to the agencies to

> identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

547 U.S. at 781 (Kennedy, J., concurring). The Preamble suggests that, by including a definition of "tributary" in the proposed rule, the agencies have satisfied Justice Kennedy's conditions for the regulation of wetlands, and thus are free to wholly jettison the "significant nexus" text. *See, e.g.,* 84 Fed. Reg. at 4,186 ("Justice Kennedy's 'significant nexus' test for wetlands adjacent to nonnavigable waters was only needed 'absent more specific regulations.'") (citing 524 U.S. at 782 (Kennedy, J., concurring). But Justice Kennedy's statement makes clear that it is not simply *any* categorical regulation on tributaries that could replace the "significant nexus" test, but rather a regulation that ensures inclusion of those tributaries that "are significant enough" that nearby wetlands are likely "to perform important functions for an aquatic system incorporating navigable waters." The proposed rule does not do this.

(ii) Streams and Other Waters: The Preamble suggests that the agencies have chosen to strip numerous streams, lakes, and other surface waters of CWA

protection because they do not believe that Justice Kennedy intended his "significant nexus" test to apply to waters other than wetlands. 84 Fed. Reg. at 4,175 (questioning "whether the agencies have previously overread Justice Kennedy's opinion to mandate the significant nexus test outside the actual holding of Justice Kennedy's opinion, which was limited to the wetlands at issue in that case."). The agencies also suggest that the majority opinion in *SWANCC*, which Justice Kennedy joined, takes a narrower approach to CWA jurisdiction than Justice Kennedy's *Rapanos* concurrence, and thus that the 2015 Rule overreached in its application of the "significant nexus" test. 84 Fed. Reg. at 4,196. This is manifestly illogical. Certainly, Justice Kennedy is in the best position to know what he meant by signing on to the *SWANCC* majority, and his *Rapanos* concurrence is the best indication of his views on *SWANCC*. In that concurrence, he describes *SWANCC* as follows:

> In *SWANCC*, the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, *a water or wetland* must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made. [*SWANCC*, 531 U.S.]., at 167, 172.

Rapanos, 547 U.S. at 759 (Kennedy, J., concurring) (emphasis added) (second internal quotes omitted). The reference to a "water" *or* "wetland" clearly indicates that the "significant nexus" test extends to all waters that are not themselves traditionally navigable, and not just wetlands. Indeed, *SWANCC*, from which Justice Kennedy draws the "significant nexus" test, dealt with an isolated pond ("an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds," 531 U.S. at 162), and not with wetlands. At issue in *SWANCC* was whether the Migratory Bird Rule, a regulation issued by the Corps of Engineers, could be used to justify extending CWA jurisdiction to that isolated pond when it had not been shown to have a significant nexus to navigable waters. *See also Rapanos*, 547 U.S. at 776 (Kennedy, J. concurring) ("The concerns addressed in *SWANCC* do not support the plurality's interpretation of the Act.").

In his *Rapanos* concurrence, Justice Kennedy pointedly disagrees with the plurality's exclusion of intermittent and ephemeral waters, and plainly extends this discussion to ephemeral streams. *E.g.*, 547 U.S. at 769 (disagreeing with the plurality's conclusion that "intermittent or ephemeral streams" are not waters of

the U.S.); 770 ("the dissent is correct to observe that an intermittent flow can constitute a stream, in the sense of '[a] current or course of water or other fluid, flowing on the earth,' (quoting Webster's Second 2493), while it is flowing") (internal citation and quotes omitted). Given that a majority of the justices in *Rapanos* would extend CWA jurisdiction under Justice Kennedy's "significant nexus" test, the proposed rule's blanket withdrawal of jurisdiction from ephemeral features and isolated (non-navigable) waters is inconsistent with Supreme Court precedent.

2. The Agencies Do Not Meaningfully Engage the Science Reports on Which the Current Rule is Based.

The blanket exclusion of ephemeral waters is also inconsistent with the findings of the science reports prepared in advance of the 2015 Rule. That report is a 423-page technical support document, which was based on a comprehensive science report that reviewed more than 1,200 peer-reviewed publications. See EPA, U.S. Army Corps of Eng'rs, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 27, 2015) ("TSD"); EPA Office of Reg'l Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review of the Scientific Evidence (Jan. 2015) ("Science Report"). As noted in the Preamble, EPA's Science Advisory Board ("SAB") reviewed those studies, and "found that '[t]he literature review provides strong scientific support for the conclusion that *ephemeral*, intermittent, and perennial streams exert a *strong influence* on the character and functioning of downstream waters and that tributary streams are connected to downstream waters.'" 84 Fed. Reg. at 4,175-76 (emphasis added). However, other than noting that the SAB found a "decreased" probability of such influence "at flow regimes less than perennial or intermittent," *Id.* at 4,176, the agencies do provide any scientific analysis – with reference to the TSD, the Science Report, the SAB's review, or any other scientific reference – to support their decision to wholly exclude ephemeral waters. Without such an analysis, the agencies have not overcome the reasonable scientific inference that the proposed rule would exclude from CWA protection ephemeral waters with a significant nexus to navigable waters.

3. The Agencies Wrongly Prioritize Protection of State Authority in Derogation of the Overriding Federal Purposes of the CWA.

An overriding theme that runs throughout the proposed rule is the importance of ceding federal authority over waters back to the states. For example, the Preamble cites deference to state authority as a principal justification for the exclusion of ephemeral waters. *See* 84 Fed. Reg. at 4,176 ("With the proposed definition, the agencies seek to avoid 'impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.' 33 U.S.C. 1370.") This is a reference to section 510(2) of the CWA, which is cited several times in the Preamble. That provision affirms the spirit of federalism that imbues the Act, but it does not bear the weight the agencies would give it here. First, the cited language is subject to an introductory proviso – "Except as expressly provided in this chapter" – that limits state authority to those waters over which the federal government has not exercised control under its Commerce Clause authority, and generally confirms that state control of waters is subordinate to the federal interest in protecting those waters. This is reinforced by the remainder of section 510 (subpart (1)), which limits state authority to regulate water pollution to standards that are *as protective or more protective* of the environment than federal standards. In other words, this section makes clear that the primary federal/state relationship in the CWA is one under which the states recognize federal primacy in protecting the waters of the United States.

The Preamble also includes at least nine citations to section 101(b) of the CWA, which articulates

> the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. §1251(b). The agencies cite this provision, and a passage in the *Rapanos* plurality, in support of their exclusion of ephemeral waters. *See* 84 Fed. Reg. at 4,176 ("The proposed approach to defining 'tributary' is also intended to *limit federal jurisdiction over ephemeral flows* and other ordinarily dry land features in order to 'preserve, and protect the primary responsibilities and rights of

States to . . . plan the development and use . . . of land . . . resources.' See [*Rapanos*] at 738 (Scalia, J., plurality).") (emphasis added). But this provision of the CWA is not designed to carve out certain waters as subject only to state jurisdiction; rather, it simply is a broad statement – extending to all "land and water resources" – recognizing the cooperative federal/state approach to water protection that embodies the Act. The states do play an important role in implementing the CWA – in permitting, enforcement, establishment of water quality criteria, among other activities – but subject to the standards, authority, and oversight of the federal government. Moreover, the overriding purpose of the CWA – in fact, the very first sentence of the statute – is set out in subsection (a) of this same section: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Especially given the SAB's conclusion that ephemeral waters "exert a strong influence on the character and functioning of downstream waters," their wholesale conclusion under the proposed rule runs afoul of this most basic purpose of the CWA. Similarly, as Justice Kennedy stressed in his *Rapanos* concurrence, "wetlands are not simply moist patches of earth," *Rapanos*, 547 U.S. at 761 (Kennedy, J. concurring); rather. wetlands "obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow … [They] can preserve downstream water quality by trapping sediment, filtering toxic pollutants, [and] protecting fish-spawning grounds." *Id.* at 808 (Stevens, J., dissenting). Exclusion of roughly half of all U.S. wetlands from coverage, as the proposed rule would do, is inconsistent with the primary purpose of the CWA, and cannot be justified by deference to state authority.

4. The Agencies Wrongly Prioritize Purported Ease of Implementation Over Faithfulness to the CWA and the Underlying Science.

The Preamble also attempts to justify the proposed rule's exclusion of a significant percentage of the nation's waters by citing the need for "bright-line" distinctions that will be easy for the agencies and the states to implement. *See, e.g.*, 84 Fed. Reg. at 4,175 ("The agencies are proposing to eliminate this case specific 'significant nexus' analysis by providing a clear definition of 'tributary' that is easier to implement."); 4,184 ("The agencies are proposing to eliminate this case-specific 'significant nexus' analysis by providing a clear category of 'waters

of the United States' that is easier for members of the public and regulatory agencies to implement."); 4,185 (the agencies favor the proposal to significantly reduce wetlands coverage because they view it as "establishing a clear, predictable regulatory framework that can be efficiently implemented"); 4,189 (declining to include wetlands with a subsurface hydrologic connection to navigable waters, despite their obvious importance to those waters, because it "could be confusing and difficult to implement"); 4,190 ("The proposed ditch exclusion in paragraph (b)(4) is intended to be clearer for the regulated public to identify and more straightforward for agency staff to implement than current practice."); and 4,196 (overall, the proposed rule is said to "provide[] a straightforward definition that would be easier to implement than the 2015 Rule.").

But convenience, though a legitimate consideration, should not be an over-arching concern. Administrative convenience does not justify excluding from coverage those waters known to have a significant nexus to navigable waterways, as they have an impact on the "chemical, physical, [and/or] biological integrity of the Nation's waters," the very qualities it is the agencies' overriding obligation to "restore and maintain." 33 U.S.C. § 1251(a). (Indeed, if ease of implementation were the overriding concern, it would make just as much sense to categorically *include*, say, all wetlands with a subsurface hydrologic connection to navigable waters or their tributaries and all ephemeral waters that feed into navigable waters or their tributaries.) In short, while ease of administration is not insignificant, there is no justification for replacing a more nuanced rule that gets it right with a bright-line rule that gets it wrong.

Conclusion

For all the reasons set forth herein, Commenters urge the agencies to set aside the proposed rule and to instead implement the current rule as written.