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For a thriving New England

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April 15, 2019

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

The Honorable R.D. James
Assistant Secretary of the Army, Civil Works
U.S. Department of the Army
104 Army Pentagon
Washington, DC 20310

Submitted online via regulations.gov

RE: Docket ID Number EPA-HQ-OW-2018-0149: Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019)

Dear Administrator Wheeler and Assistant Secretary James:

Conservation Law Foundation, Inc. ("CLF")[1], on behalf of its members, submits these comments on the above-referenced docket.

The notice of proposed rulemaking (NPRM), revising the definition of "Waters of the United States," drafted by the Department of the Army, Corps of Engineers and the EPA ("the agencies"), is a hasty and ill-considered effort by the agencies to revoke longstanding and well-considered protections of the nation's waterways under the Clean Water Act (CWA). Not only does the proposed rule strip wetlands, tributaries, and interstate waters of protection for the benefit of a few sectors of industry, but it does so without a basis in law or in sound environmental policy. In fact, the proposed rule is contrary to settled law and Supreme Court precedent.

In addition, the proposed rule relies on factors that Congress did not intend to be considered, fails to consider the environmental science of hydrology and connectivity of our nation's waters, misunderstands the federal and state partnership Congress established in the CWA, and lacks a proper rational basis as required by settled norms of administrative law. Overall, the NPRM is fundamentally flawed.

[1] Founded in 1966, CLF is a non-profit, member-supported organization with offices located in Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. CLF's advocates use law, economics, and science to design and implement strategies that conserve natural resources, protect public health, and promote vital communities in our region. Water quality issues are central to that mission, and CLF is engaged in numerous efforts to address stormwater and process wastewater pollution throughout the New England region.

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Finally, the NPRM is an unauthorized and capricious end-run around the judicial review of the agencies' 2015 WOTUS rule, which is proceeding in numerous federal courts. For the reasons stated here, and further described below, CLF strongly urges that this proposed rulemaking be withdrawn in its entirety.

The Proposed Rule Would Increase Pollution in Our Nation's Waters.

Unlike the proposed 2015 WOTUS Rule, which advanced the CWA mandate to protect waters throughout the United States, the NPRM will undermine the statute it purports to implement. By removing protections for smaller bodies of water, like streams, wetlands, and tributaries, the proposed rule increases the risk of pollution, threats to water security, loss of biodiversity, and frequency of flooding.

Fundamentally, the NPRM lacks an appreciation of the significance of smaller waterbodies to the vitality of ecosystems and our environment. It is well understood that vast and modest bodies of water are not mutually exclusive entities; negative impacts on one often impact the other. As the 2015 WOTUS rulemaking explained, "wetlands, ponds, lakes, [etc.] that are neighboring perform a myriad of critical chemical and biological functions associated with the downstream traditional navigable waters." 80 Fed. Reg. at 37085. This co-dependent relationship demonstrates why broader protection is needed nationwide. Here in New England, treasured waters like Lake Champlain in Northern Vermont, the Penobscot River in Maine, the Charles River in Massachusetts, and the bays, ponds, and streams on Cape Cod can't afford even minimal increases in nutrient pollution. Two of our longest rivers, the Merrimack and Connecticut, are examples of large, interstate waters whose well-being is greatly impacted by the water quality of hundreds of small, neighboring water bodies.

Since the 1960s, the dumping of industrial pollution and sewage into the Merrimack River, and the smaller streams that feed into it, has been difficult to curb.[2] From the White Mountains of New Hampshire to the Atlantic Ocean, this far-reaching river is finally seeing positive results after years of protection efforts. The river and its tributaries support 12 migratory fish species and more than 75 protected endangered species, but water quality remains in a volatile state.[3] The amount of pollution discharged directly into the Merrimack itself each year has decreased, but high levels of sewage, industrial waste, and fertilizer surrounding the Merrimack and entering its tributaries can incite harmful algal blooms.

Throughout New England, harmful algal blooms, which deprive waterways of life-sustaining properties, have been more rampant. The increasing frequency, duration, and breadth

[2] Sullivan, Jim. "Merrimack River Makes Top 10 List of Nation's Most Endangered Waterways." *Eagle-Tribune*, 17 Apr. 2016, www.eagletribune.com/news/merrimack-river-makes-top-list-of-nation-s-most-endangered/article_f21236ba-9491-52b1-ba92-bfee7675e5b4.html.
[3] *Id*.

of these blooms demonstrate a need to maintain and expand upon protections for modest bodies of water. Increased development and increased use of fertilizer not only threaten small waterbodies along the Merrimack, but also along the Connecticut River, the largest river in New England.

The Connecticut River, which flows down from New Hampshire, through Vermont, Massachusetts, and Connecticut, has approximately 148 tributaries. Many of the tributaries are highly susceptible to anthropogenic pollution from swimming and boating. In addition, accidental discharges of untreated sewage and excessive nutrient loading are pervasive problems.

In recent years, numerous accounts of sewage, oil, and other pollutant spills into unnamed tributaries that flow into the Connecticut River have been documented. For example, in July of 2016, a backed up and leaking sewer was discharging sewage into one such tributary unlikely to be protected under the Proposed Rule.[4] In 2017, Black River, one of the Connecticut River's largest tributaries located in Vermont, was polluted with one million gallons of partially treated waste.[5] E-coli bacteria counts reached 770 per 100 milliliters, nearly three times the acceptable limit. If left untreated, the contamination would have harmed anyone recreating in the river, as well as the benthic macroinvertebrates in the river and its connected water bodies. Under the proposed rule, the Black River likely remains protected under the CWA, but a similar spill could easily occur in one of the many nearby tributaries or streams that is not.

The Proposed Rule Would Harm Our Nation's Wetlands and Drinking Water Sources.

Wetlands are one of the planet's most valuable environmental service providers. They can be found in the vast majority of New England landscapes, with Maine alone holding 2.175 million acres.[6] Wetland retention allows for groundwater to be replenished, larger bodies of water to be naturally filtered, and flood risks to be mitigated. Wetlands even store the carbon emissions that drive global warming, further demonstrating a collective benefit to protecting wetlands. If millions of acres of wetlands, estuaries, and marshes lose CWA protection, these environmental services will cease. If the proposed rule goes into effect, it is estimated that up to 110 million acres of wetlands in the United States will be at risk for severe pollution and filling.

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[4] State of Vermont, Wastewater Inventory Website, *Unpermitted Discharged – Public Report,* https://anrweb.vt.gov/DEC/WWInventory/UnpermittedDischargesPublicReport.aspx, (last visited April 4, 2019).

[5] Evans, Brad. "Up to 1M Gallons of Partially Treated Sewage Released into Black River." *WPTZ*, 6 Oct. 2017, www.mynbc5.com/article/up-to-1m-gallons-of-partially-treated-sewage-released-into-black-river/9519092.

[6] US Fish & Wildlife Service, "Wetlands of the Northeast," Apr. 2010, www.fws.gov/northeast/ecologicalservices/pdf/Northeast_Wetlands_Final_Report.pdf.

The preservation of wetlands and the protection of smaller bodies of water are essential to keeping floods manageable, which in effect, keeps New England waters potable. New Englanders are fortunate to have some of the most notable freshwater reserves in the country. The Merrimack River provides approximately 600,000 people with potable water, while the Connecticut River provides it to millions.[7] Yet the threat to water security persists due to increasing flood rates. Flood waters can cause overflows of sewage systems, intrusion of saltwater into groundwater, and nutrient overloads from agricultural runoff. E-coli, salt, and excessive algal blooms lead to undrinkable water.

Flooding not only damages drinking water but can cause displacement for residents. Homes all over New England are impacted by river-flooding, including in Newburyport, Massachusetts along the Merrimack, Cranston, Rhode Island on the Pawtuxet River, Northern Maine along the Saint John River.[8] The wetlands and surrounding, modest bodies of water help keep extraneous flood impacts from worsening. According to a 2017 slideshow prepared by the agencies' staff at least 51 percent of wetlands nationwide would not be protected under the new definition of "waters of the United States."[9] Undoubtedly, the proposed rule puts New England's iconic rivers and connecting waterways, its drinking water, and our residents at risk.

The Agencies' Rulemaking Process was Arbitrary and Capricious.

An agency action is arbitrary and capricious if it fails to "examine relevant data and articulate a satisfactory explanation for the action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In addition, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem…." *Id.* Here, the agencies' NPRM subverts the regular process contemplated by the Administrative Procedure Act (APA) of full and expert consideration of the relevant issues. *See* 5 U.S.C. § 553. The proposed rule is arbitrary and capricious because it: relies on factors which Congress did not intend for it to consider; entirely fails to consider important aspects of the problem; fails to provide a fully detailed justification

[7] Sullivan, *supra* note 2.

[8] Bentley, Jimmy. "Pawtuxet River Flooding Caused Problems in Cranston." *Stone Mountain-Lithonia, GA Patch,* 27 Sept. 2018, patch.com/rhode-island/cranston/flooding-cranston-warning-place-until-wednesday-night; NECN. "Cranston, RI Residents Displaced by Labor Day Flooding." *NECN*, 28 Feb. 2014, www.necn.com/news/newengland/_NECN__Cranston__RI_Residents_Displaced_by_Labor_Day_Flooding_NECN-247886851.html; Mitchell, Jennifer. "Flooding of the St. John River Reaches Historic Level." *Maine Public*, https://www.mainepublic.org/post/flooding-st-john-river-reaches-historic-levels.

[9] Wittenberg, Ariel. "EPA claims 'no data' on impact of weakening water rule. But the numbers exist." *E&E News*, 11 Dec. 2018, https://www.sciencemag.org/news/2018/12/epa-claims-no-data-impact-weakening-water-rule-numbers-exist.

for its new policy; and incorrectly argues that giving the States more jurisdictional control over "waters" is consistent with the overall objective of the CWA.

The proposed rule relies on factors that Congress did not intend for it to consider.

The first declared congressional purpose of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Over the past 30 years, the Corps and the EPA have developed regulatory rules and policies under the CWA for determining which sites are "waters of the United States" subject to federal supervision, by giving meaning to statutory text as well as the science of hydrological connection and other relevant expert considerations. When drafting the 2015 WOTUS Rule, the agencies undertook an extensive legal analysis of text, structure, and legislative history of the CWA, as well as of Supreme Court and other governing precedent. They also considered extensive assessments of impacts (both costs and benefits), peer reviewed research and analysis of the ecological connectivity of the nation's waters, careful studies of the impact of different regulatory alternatives, an assessment of federal, state and tribal roles under the CWA, and an analysis of the clarity and predictability of alternative regulatory approaches.

In contrast, Executive Order 13778, signed February 28, 2017, announced a new policy that is at odds with the CWA, stating that when federal agencies implement the CWA, a significant policy objective shall be "promoting economic growth [and] minimizing regulatory uncertainty." Exec. Order No. 13778, 82 Fed. Reg. 12497 (Mar. 3, 2017). The Executive Order directed the heads of the agencies to rescind or revise the previous administration's 2015 WOTUS rule and to implement the President's new objective. *Id.* In their proposed rule the agencies reference this Executive Order, often refer to their "Economic Analysis of the Proposed Revised Definition of 'Waters of the United States,'" and declare they are "attempting to more clearly establish demarcations between "waters of the United States" and "point sources" to reduce regulatory uncertainty. Problematically, the CWA does not mention the promotion of economic growth or minimizing regulatory uncertainty. *See* 33 U.S.C. 1251. The agencies provide no rationale for their full review and application of these inapposite factors.

The agencies proposed rule fails to consider important aspects of the problem.

The agencies propose a potentially sweeping rollback of existing protections for wetlands, tributaries and interstate waters, but have failed to supply reliable data that would alert the public to the real-world impacts. In their NPRM, the agencies repeatedly admit that they lack any data or quantitative information on the impacts of the proposed rule. In fact, the agencies note that they "are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction," and that "establishing a mapped baseline from which to assess regulatory changes is likewise impractical at this time." 84 Fed. Reg. at 4200. The agencies also admit that they are "not aware of any database that identifies the jurisdictional status of interstate

waters … and therefore lack the analytical ability to perform a comparative analysis (show the impact of their new exclusion for interstate waters) with precision." 84 Fed. Reg. at 4172.

Additionally, the agencies fail to consider the ecological science of water and the impact of connectivity on pollution problems for the Nation's waters. During its rulemaking effort leading up to the promulgation of the 2015 "waters of the United States" Rule, the EPA's Office of Research and Development created a "Connectivity Report" that summarized over 1,200 peer-reviewed publications and the scientific understanding about the connectivity and mechanisms by which streams and wetlands affect the physical, chemical, and biological integrity of downstream waters. Before its release, the report was reviewed by a Science Advisory Board ("SAB") tasked with providing scientific advice and information to EPA, which resulted in a 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," admittedly describing the connectivity as a gradient and not as a binary property. 84 Fed. Reg. at 4175. Here, the agencies reference this report as a justification for *not* considering other aspects of the ecological science of water and the impact of connectivity on pollution problems for the Nation's waters. They state that the gradient determination shows that "science cannot be used to draw the line between Federal and State waters." 84 Fed. Reg. at 4176. Considering the overall lack of analysis conducted on important aspects of removing CWA protections, the agencies' proposed rule fails the arbitrary and capricious standard.

Even if an executive fiat lawfully could amend the CWA to make the objectives of "promoting economic growth [and] minimizing regulatory uncertainty" paramount, the NPRM would fail because it disregards the nexus between the services that wetlands and clean water provide and the strength of the economy. Clean drinking water supplies are essential to community growth and development; flood storage, storm surge mitigation, and flood risk reduction are essential to economic resilience and to rapid economic recovery after extreme weather events; clean water supports tourism and recreation sectors that are essential to the economies in New England states.[10] In Boston alone, the cleanup of Boston Harbor has spurred current redevelopment investments in mixed-use, residential, and commercial construction

[10] In Maine, tourism is the State's largest industry. *See* Strauss, William. "Maine and Tourism: The State's Largest Industry." *FutureMetrics*, Jan. 2010, http://futuremetrics.info/wp-content/uploads/2013/07/Tourism-White-Paper.pdf. In New Hampshire, tourism is the second-largest industry. *See* StateImpact NH. "New Hampshire Tourism." NHPR, https://www.nhpr.org/topic/new-hampshire-tourism#stream/0. In Massachusetts, tourism is the third-largest industry. *See* Machado, Elisa, "Tourism is the 3rd largest industry in Massachusetts." WWLP, 6 Apr. 2017, https://www.wwlp.com/news/state-politics/tourism-is-the-3rd-largest-industry-in-massachusetts_20180314100308235/1043167253. In Rhode Island, tourism is the fourth-largest industry. McDarris, Alisha. "Top 5 Industries in Rhode Island." Newsmax.com, 10 Apr. 2015, https://www.newsmax.com/fastfeatures/industries-in-rhode-island-economy/2015/04/10/id/637777/.

exceeding $8 billion.[11] Yet the NPRM never considers, let alone quantifies, the significant and adverse impacts to economic growth that would result inevitably from eliminating CWA protection from more than half of the waters otherwise entitled to CWA protection.

The Agencies' reliance on *FCC v. Fox TV Stations Standard* is flawed.

The agencies rely on *FCC v. Fox TV Stations* to justify their proposed rule stating they provided a "reasoned explanation" for their policy change. 84 Fed. Reg. at 4169. However, *Fox TV Stations* requires agencies to provide a more detailed justification when their "factual findings contradict those that underlay [their] prior policy; or when [their] prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox TV Stations*, 556 U.S. 502, 515 (2009). Under the proposed rule, many water bodies will no longer receive the protections granted to "waters of the United States,' and as explained in detail above, the public has significant "reliance interests" in the protections of those water bodies – namely, clean drinking water, clean waters for recreation, and wetlands for protection from flooding.

States also have significant "reliance interests" in the protections of those water bodies losing federal protection. States currently relying on the old policy will now be forced to create a new system and programs to determine which waters they have the authority and responsibility to protect. The agencies claim to be changing the WOTUS definition to reduce confusion and provide clarity, but the 2015 WOTUS definition was designed to do just that. *See* 80 Fed. Reg. at 27055-57. The current NPRM's narrowing interpretation will cause states to adopt complex, confusing, and inconsistent programs to regulate waters no longer under federal protection. In addition, downstream states will be more vulnerable to upstream activities that occur in other states and would have no recourse to address the resulting risk of negative impacts on water quality. The regulatory burden for states across the country will inevitably increase, and additional resources will be required. The agencies do not address these reliance interests, and therefore do not meet the requirement to give a more detailed justification to satisfy a "reasoned explanation." *See Fox TV Stations*, 556 U.S. at 515.

Also, agencies must provide a more detailed justification when [their] "new policy rests upon factual findings that contradict those which underlay [their] prior policy." *Id.* at 515-16. In their 2015 rule, the agencies provided strong scientific support for their decisions to adopt a broad definition of tributaries, to regulate adjacent wetlands based on hydrological and ecological connections other than surface connections, and to assert jurisdiction over other waters that agencies determine, on a case by case basis, to have a significant nexus to waters of the United States. *See* 80 Fed. Reg. at 17058-73. In their current proposal, the agencies reject those findings without explaining how or why those scientific conclusions can no longer be

[11] Campbell, Bradley and Vivien Li. "The Businesses That Benefit From A Clean Harbor Should Help Boston Address Climate Change." *WBUR*, 14 Nov. 2018, https://www.wbur.org/cognoscenti/2018/11/14/climate-change-resiliency-bradley-campbell-vivien-li.

supported. Instead, the agencies make a passing reference to the Connectivity Report to support their conclusion that the questions to be decided by the agencies are legal, rather than scientific. *See* 84 Fed. Reg. at 4175. Because the agencies disregard the science-based facts without reasoned justification in fashioning the NPRM, their action is arbitrary and capricious.

Giving the states more control over the "Waters" does not promote the overall purpose of the Clean Water Act.

The CWA's purpose is "to protect the Nation's waters." 33 U.S.C. 1251(a). The agencies, in their NPRM, repeat the argument that their proposed rule will reflect more the overall purpose of the Act by recognizing "the primary responsibilities and rights of the States" as expressed in the policy section of the Act. 33 U.S.C. 1251(b). The agencies improperly assert that the statute should be interpreted to advance the policies of Section 1251(b), though such an interpretation would frustrate the objectives of Section 1251(a). Further, the agencies fail to acknowledge that 33 U.S.C. 1251(b) gives examples of when states should take the lead role (i.e., the construction grant program and implementing permit programs) and then provides defined guidelines for these examples under the Act. In contrast, the agencies' proposed rule fails to give any guidelines to the states on how to apply the new rule nor how to determine which "waters" fall under whose jurisdiction.

The NPRM claims that the proposed rule will create an easier line-drawing between "those waters subject to federal requirements under the CWA and those waters that States and Tribes are free to manage under their independent authorities." 84 Fed. Reg. at 4169. The agencies suggest that the proposed rule will "establish categorical bright lines that provide clarity and predictability for regulators and the regulated community…," and it will "eliminate [the] case-specific 'significant nexus' analysis" of the so-called Kennedy rule and provide clear definitions that will be "easier to implement." 84 Fed. Reg. at 4170, 4175. Yet the agencies fail to explain why Justice Scalia's "continuous surface connection" test will be easier to implement than Justice Kennedy's "significant nexus" test, or how it would establish a categorical bright line.

The NPRM's attempt to re-balance federal and state roles established in the CWA usurps the prerogatives of Congress and would not, even if lawful, bring clarity and predictability to the regulatory program. Industry will not know whose standards govern, and responsibility over interstate water will be murky at best. Beneficiaries of clean water for drinking and recreating, citizens, residents municipalities and businesses, may not understand which authority, state or federal, is responsible and accountable for maintaining that clean water. Finally, the supplemental legal authority of citizens to sue for violations of the CWA, an essential component of the statutory framework enacted by Congress, will be muddied (and perhaps discouraged) over the new and inchoate divisions of legal authority.

Lastly, the agencies fail to address how the proposed rule will further the congressionally

declared goal of the CWA simply because it will not. Stripping waterways of basic protection thwarts our ability to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. 1251(a).

The proposed rule is based on an incorrect interpretation of *Rapanos v. United States.*

The agencies' proposed rule defines "waters of the United States" according to their understanding of Justice Scalia's plurality opinion in *Rapanos*. 84 Fed. Reg. at 4170. This is a fundamental misinterpretation of the law. Because there was no majority opinion in *Rapanos*, lower courts and regulated entities must determine the limits of the reach of the CWA on a case-by-case basis, in accordance with *Marks v. United States*. *Rapanos v. United States*, 547 U.S. 715 (2006). (Chief Justice Roberts alluded to this exact procedure in his concurrence. *Id.* at 758). According to *Marks v. United States*, the foremost case on which opinion should hold when there is no majority opinion, the Kennedy opinion in *Rapanos*, and not the Scalia plurality, is the law of the land. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Justice Scalia's plurality opinion in *Rapanos* rejects the "mere hydrology connection" test in favor of CWA jurisdiction over "*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." *Id.* at 742. Justice Scalia attempted to limit the scope of "waters of the United States," arguing that the phrase refers primarily to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'" than the wetlands adjacent to such features." *Id.* at 734 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985)). He also rejected the notion that ecological considerations can provide an independent basis for including entities such as "wetlands" within the phrase "the waters of the United States." *Id.* at 741 (citing *SWANCC v. Army Corps of Engineers*, 531 U.S. 159, 167 (2001).

In his concurring opinion, Justice Kennedy also rejected the "mere hydrology connection test," but set forth a different standard to determine whether the specific wetlands at issue possessed a "significant nexus" with navigable waters." *Id.* at 787. Justice Kennedy's "significant nexus test" requires the Corps to establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries. *Id.* at 782. Justice Kennedy derived the test from *SWANCC,* which stated that, "it was the significant nexus between wetlands and navigable waters that informed our reading of the Clean Water Act in *Riverside Bayview Homes*." *Rapanos,* 547 U.S. at 767 (citing *SWANCC,* 531 U.S. at 167). The concurring opinion interpreted the following line from *Riverside Bayview* – "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water" – to imply that the wetlands' significant nexus with navigable waters was what established the Corps' jurisdiction over them as waters of the United States. *Rapanos*, 547 U.S. at 779 (citing *Riverside Bayview,* 474 U.S. at 135).

Justice Kennedy also determined the required nexus according to the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Rapanos,* 547 U.S. at 779; 33 U.S.C. § 1251(a). Justice Kennedy reasoned that wetlands possess the requisite nexus and are "navigable waters" if the wetlands significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." *Rapanos,* 547 U.S. at 780.

Justice Kennedy's significant nexus test is the law of the land.

Marks v. United States states that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193. The "narrowest grounds" is understood as the "less far-reaching" common ground. *Johnson v. Board. of Regents*, 263 F.3d 1234, 1247 (11th Cir. 2001). Thus, the governing precedent of a decision involving mere plurality and concurring opinions is the lower court's or the implementing agencies' determination of the opinion based on the narrowest legal ground.

In *United States v. Gerke Excavating*, the Court concluded that Justice Kennedy's ground for reversing in *Rapanos* was narrower than the plurality's. *United States v. Gerke Excavating Inc.,* 464 F.3d 723, 724 (7th Cir. 2006). The Court explained that Justice Kennedy rejected two limitations imposed by the plurality on federal authority over wetlands under the CWA: the requirement of a "continuous surface connection" between the wetland and the "water" it abuts; and the requirement that "navigable waters" must be "relatively permanent, standing or flowing bodies of water." In addition, even Justice Scalia's plurality opinion takes jabs at Justice Kennedy's "significant nexus test" for not reining in the agency enough. *See Rapanos*, 547 U.S. at 756. "The plurality judges thought that Justice Kennedy's ground for reversing was narrower than their own." *Gerke* at 724. The Court in *Gerke* concluded that Justice Kennedy's concurrence would almost always be the narrowest in terms of reining in federal authority. *Id.* at 724-25.

Similarly, two other circuit courts have concluded that Justice Kennedy's test is the narrowest and least far-reaching. *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007); *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006). Not a single federal court of appeals has determined that Justice Scalia's plurality opinion in *Rapanos*, on the constitutional limits of federal authority, is the law of the land.

The Agencies failed to properly apply *Marks v. United States.*

The agencies' proposed rule turns the doctrine of *Marks* on its head by adopting Justice Scalia's plurality opinion. The agencies appear to disregard the holding of *Marks* when they

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conclude that they "do not think that the opinion of a single justice in a complex case should be the primary determinant of federal jurisdiction over potentially large swaths of aquatic resources…." 84 Fed. Reg. at 4196. Oddly, the NPRM frequently references Justice Scalia's opinion as if it were binding precedent to limit government action based on Commerce Clause restrictions and constitutional norms regarding states' rights. For example, the NPRM states that: "ensuring that States retain authority over their land and water resources … helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act," followed by a citation to Scalia's plurality opinion. 84 Fed. Reg. at 4169.

Not only do the agencies take the plurality opinion in *Rapanos* as binding, when legal precedent says otherwise, they also fail to acknowledge the direction taken by any of the federal circuit courts who have addressed the issue. In accordance with the proper reading of *Marks*, Justice Kennedy's concurrence governs, and thus the proposed rule is contrary to settled law and Supreme Court precedent.

In conclusion, for the foregoing reasons, CLF believes the rulemaking should be withdrawn in its entirety. The 2015 WOTUS rule should continue in effect to the extent authorized by the federal courts in pending judicial review. The protection of all waters of the United States is of considerable interest to the members of Conservation Law Foundation. On their behalf, we thank you for your consideration of these comments.

CONSERVATION LAW FOUNDATION, INC.

By its attorney:

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