Comments of the Competitive Enterprise Institute, Americans for Competitive Enterprise, Americans for Tax Reform, Committee for a Constructive Tomorrow, Institute for Energy Research, National Center for Public Policy Research, Science and Environmental Policy Project, Small Business & Entrepreneurship Council, and Texas Public Policy Foundation on the U.S. Army Corps of Engineers and Environmental Protection Agency's Proposed Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014)

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The Competitive Enterprise Institute, Americans for Competitive Enterprise, Americans for Tax Reform, Committee for a Constructive Tomorrow, Institute for Energy Research, National Center for Public Policy Research, Science and Environmental Policy Project, Small Business & Entrepreneurship Council, and Texas Public Policy Foundation oppose the rule proposed by the Environmental Protection Agency and Army Corps of Engineers ("Agencies") to redefine the term "Waters of the United States" for purposes of the Clean Water Act ("CWA"). The proposed rule dramatically expands the Agencies' regulatory authority, to the detriment of property rights and of federalism. The proposed definition violates the Clean Water Act and exceeds the federal government's authority under the Commerce Clause. Although greater clarity is required as to the boundaries of CWA jurisdiction, the Agencies should withdraw this proposal and go back to the drawing board to craft a new approach that conforms with governing law.

I. The Proposed Rule Expands the Agencies' CWA Jurisdiction

The proposed changes to the definition of "waters of the United States" are, at their core, about the scope of the Agencies' jurisdiction under the Clean Water Act. Sections 1311(a) and 1362(12), two of the principal provisions of the CWA, prohibit "the discharge of any pollutant by any person" into "navigable waters," without a permit. "Navigable waters" is in turn defined as "*the waters of the United States*, including the territorial seas." 33 U.S.C. § 1362(7) (emphasis added). As such, to expand the reach of the term "the waters of the United States" is to expand the scope of Section 1311(a)'s prohibition on the discharge of pollutants and, ultimately, the bounds of the Agencies' CWA jurisdiction.

If one's property falls under the definition of "the waters of the United States," one must seek a permit from the EPA or Army Corps to make virtually any economically beneficial use of one's property. 33 U.S.C. §§ 1342(a), 1344. This is because "pollutant" for CWA purposes includes far more than substances traditionally considered pollution, such as "sewage, garbage, . . . chemical wastes, biological materials, [and] radioactive materials." 33 U.S.C. § 1362(6). Rather, "pollutant" also encompasses "heat," "rock, sand, cellar dirt

and . . . agricultural waste discharged into water." *Id*. Consequently, to undertake such projects as laying a foundation for a house, reinforcing a creek running through one's yard with stones, or restoring a polluted site on a property designated, containing, or even abutting "waters of the United States," one must subject oneself and one's property to the Agencies' procedures and discretion. *See, e.g.*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009); *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006). This burden "is not trivial." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion). As of a decade ago, "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Id*.

There are two ways to determine that a body of water or a parcel of land falls under the definition of "waters of the United States," and thus triggers the aforementioned burdens. First, a body of water can fall under the bright-line, *per se* jurisdictional definitions. Alternatively, a body of water can be covered by the "other waters" jurisdictional category, which requires a fact-intensive, case-specific finding. The proposed rule significantly expands both of these jurisdictional categories.

A. Expansion of *Per Se* Jurisdiction

The proposed rule expands the *per se* jurisdictional category by "propos[ing] for the first time a regulatory definition of 'tributary'" and by "propos[ing] for the first time to define an aspect of adjacency—'neighboring'" so as to encompass more "than simply adjacent wetlands." Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,189, 22,198–99 (proposed Apr. 21, 2014).

1. New definition of "tributary"

The Agencies are proposing a definition of "tributaries" to avoid judicial scrutiny of their extra-statutory jurisdictional assertions. In recent years courts have rightly expressed skepticism about the Agencies' attempts to go beyond their congressional authorization by,

inter alia, adding "tributaries" to the definition of "navigable waters" and then reading "tributaries" broadly. *See, e.g.*, *Rapanos*, 547 U.S. at 726–27 (plurality opinion) (describing some of the Corps' most "implausibl[e]" "sweeping assertions of jurisdiction" under the definition of "tributaries" in recent years); *Precon Dev. Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 294 (4th Cir. 2011) (expressing doubt that capacious definition of tributary will satisfy significant nexus test stated in Justice Kennedy's *Rapanos* opinion).

According to the proposed rule, a "tributary" will be "a water physically characterized by the presence of a bed and banks and ordinary high water mark, . . . which contributes flow, either directly or through another water," to waters over which the Agencies have proper jurisdiction. 79 Fed. Reg. at 22,272. Breaks in that flow, natural or man-made, do not cause a water to "lose its status as a tributary . . . so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id.* The term "ordinary high water mark," which is crucial to determining "tributary" under the proposed rule, is not itself clearly defined.[1]

At first glance, the proposed definition appears to be little more than the recitation of the physical characteristics of a body of water—bed, banks, high water mark. Yet a closer look reveals that the proposed definition expands the concept of "tributaries" to include dry land over which water occasionally flows. As the explanatory notes accompanying the proposed rule make explicit, "[a] bed and banks and ordinary high water mark . . . . can be created by ephemeral, intermittent, and perennial flows." *Id.* at 22,202. And such ephemeral

[1] To the extent that the Agencies intend to elucidate the meaning of "ordinary high water mark," or other central terms, outside of this rulemaking, that would only confirm that the proposed rule is incomplete. Attempts to define such terms through guidance, blog posts, etc., would be an improper attempt to circumvent the requirements of the Administrative Procedures Act.

and intermittent waters need not contribute flow directly to navigable waters, so long as some circuitous route can be traced through a series of other waters. Thus, if the Agencies can show, for example, that the runoff in an ordinarily dry drainage ditch at the side of the road leads, at times of extreme weather, to other ditches that themselves eventually feed into navigable waters, the Agencies can claim that that ditch is a "water of the United States."

2. Re-definition of "adjacency"

Wrapping ambiguity in vagueness under the pretense of providing "clarity," the Agencies propose a definition of "adjacent" that gives them nearly boundless discretion. The Agencies claim that they are only seeking to "further clarify the meaning of 'adjacent' by defining one of its elements, 'neighboring.'" *Id.* at 22,193. However, the proposed definition of this constitutive "element" is so broad that it totally eclipses the original term. Specifically, the proposed definition of "neighboring" introduces into CWA regulations the concept of indefinitely large neighboring "areas," all waters inside of which come under the Agencies' jurisdiction. Because all waters inside these neighboring "areas" need not themselves be neighboring the core navigable water, the Agencies can use the definition to assert jurisdiction over waters that are not actually adjacent, bordering, or even near those waters that do fall within the Agencies' proper jurisdiction.

The proposed rule defines "neighboring" as all "waters located within the riparian area or floodplain of a water" over which the Agencies have proper jurisdiction, "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." *Id.* at 22,273. "Riparian areas" are further defined as the entire "transitional *areas* between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems." *Id.* (emphasis added). And "floodplains" are defined in similarly expansive terms: "*area[s]* bordering inland or coastal waters that [were] formed by sediment deposition from such water under present climatic conditions and [are] inundated during periods of moderate to high water flows." *Id*. (emphasis added).

How expansive is the area between ecosystems that "influence[s] the exchange of energy and materials" between them? Do "present climatic conditions" encompass the last decade? The last century? The period since the last ice age? How often does an area have to experience a flood to fall within the floodplain? Once a decade, or once a century? The regulation answers none of these questions.

B. Expansion of Case-Specific Jurisdiction

The Agencies, concerned that the current list of types of "other waters" covered by existing CWA regulations "has been incorrectly read as an exclusive list," are proposing to do away with the enumerated list entirely. *Id.* at 22,211. In its place, the Agencies suggest a supposedly "case specific" analysis. In truth, however, the Agencies seek to replace the list of "other waters" with a *regional* "significant nexus" test. Under the proposed rule, the Agencies would have jurisdiction over all "water[s], including wetlands, [that] either alone or *in combination with other similarly situated waters in the region* . . . significantly affect[] the chemical, physical, or biological integrity of a water" over which the Agencies have proper jurisdiction. *Id*. at 22,274 (emphasis added).

This definition of "other waters" belies the claim that the Agencies intend to conduct case-specific analyses. But by how much is not clear until one considers how broad the category of "region" they propose is. "Region" is defined as "the watershed that drains to the nearest" currently or potentially navigable water, interstate water or wetland, or territorial sea. *Id*. Any place that is contained in the watershed of any of those waters falls into a CWA region. Needless to say, such regions can be enormous: the Chesapeake Bay Watershed, for instance, stretches north of Cooperstown and south of Richmond, covering all of Maryland and most of Pennsylvania and Virginia.

Within these regions, the Agencies can conduct a single "significant nexus" analysis over all waters that "perform similar functions" and are "sufficiently close together . . . that they can be evaluated as a single landscape unit with regard to their effect on the chemical,

physical, or biological integrity" of the "water of the United States." *Id.* What, precisely, a "single landscape unit" is, and how broadly an "effect" is defined, is unclear.

II. The Proposed Rule Exceeds the Agencies' Statutory Authority Under the Clean Water Act

The proposed rule continues "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute." *Rapanos*, 547 U.S. at 722 (plurality opinion). The proposed rule adopts a view of the Agencies' jurisdiction that is, as the plurality opinion in *Rapanos* described, basically unbounded:

> The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

Id.

Accordingly, the proposed rule exceeds the limits of the Agencies' statutory jurisdiction for the reasons stated in the plurality opinion. "'[T]he waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id*. at 732–33 (footnote and citation omitted). Yet the proposed rule sweeps up so-called "tributaries" that are, at most, the sites of ephemeral and intermittent flows. Likewise, it sweeps up sites that lack even ephemeral or intermittent flows merely because they are

within the "region" of actual bodies of water. The Agencies, however, lack the statutory authority to assert jurisdiction over "transitory puddles or ephemeral flows of water," much less land that lacks even those water features. *Id*. at 733. Accordingly, the proposed rule is *ultra vires*.

As the plurality opinion explains, this broad assertion of jurisdiction also directly conflicts with the CWA's definition of "point source." *See id*. at 735–36. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act also defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). Thus, "point sources" and "navigable waters" must comprise, under ordinary principles of statutory interpretation, separate and distinct categories. Yet the proposed rule depends on a reading of "navigable waters" that encompasses all or nearly all point sources. Because that reading is precluded by the statutory text's separation of "navigable waters" and "point sources," the proposed rule is *ultra vires*.

Were there any doubt regarding these statutory questions, it is resolved by the CWA's statement that it is "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 . . . ." § 1251(b). The Agencies' broad reading of "waters of the United States" to assert control over the development and use of land in entire watershed "regions" is flatly inconsistent with the Act's stated policy and therefore must be rejected. That, in turn, renders the proposed rule *ultra vires*.

III. The Proposed Rule Violates Even the Broadest Reading of *Rapanos*

A. *Rapanos's* Two-Opinion Majority

Rapanos has no single controlling opinion. Rather, the majority was split between a four-Justice plurality authored by Justice Scalia and a special concurrence (i.e., concurring in the judgment only) by Justice Kennedy.

Both the four-Justice plurality and Justice Kennedy's concurrence agree that the terms "navigable waters" and "waters of the United States" in the CWA encompass more than waters that are either navigable in fact or potentially navigable. *Rapanos* at 730–31, 767. They diverge, however, when it comes to determining which non-navigable waters fall under the definition of "the waters of the United States." As described above, the plurality opinion correctly states a practically administrable test based on the physical characteristics of the bodies of water in question.

By contrast, Justice Kennedy's concurrence introduces a "significant nexus" test for CWA jurisdiction. This test, he writes, should to be used to determine which non-navigable-in-fact waters fall under the definition of "waters of the United States." Noting that "Congress enacted the law to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" Justice Kennedy concludes that Congress gave the Agencies authority over both the nation's waters and those areas that are critical to the integrity of the nation's waters. *Id.* at 779 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a)). He insists that the Agencies demonstrate that any non-navigable waters they seek to regulate have a significant hydrologic connection, or "significant nexus," to the nation's navigable waters.

Obvious though it may be, it bears emphasizing: the "significant nexus" test Justice Kennedy proposes requires that the nexus be, well, *significant*. To regulate waters beyond those immediately adjacent to the nation's waters, the Agencies must demonstrate a hydrologic nexus that is more than "speculative or insubstantial." *Id.* at 780 (Kennedy, J., concurring). "Given the potential overbreadth of the [Agencies'] regulations, this showing is necessary to avoid unreasonable applications of the statute." *Id.* at 782 (Kennedy, J., concurring).

As a consequence, Justice Kennedy's test would preclude the Agencies from "regulat[ing] drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id*. at 780–81 (Kennedy, J., concurring).

B. The Agencies Incorrectly Take the Broadest Possible View of *Rapanos*

The EPA has taken the official position that *both* the four-Justice plurality and Justice Kennedy's concurrence form the controlling legal test in *Rapanos*. Envtl. Prot. Agency, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States, at 3 (Dec. 2, 2008), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (last visited Nov. 12, 2014). In other words, in the agency's view, "regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied." *Id*.

The proposed rule, however, scrupulously avoids stating which opinion (or opinions) the Agencies believe to be controlling. At the least, the Agencies appear to have adopted the position that the entirety of Justice Kennedy's concurrence may be relied upon because it received the support of "a majority of justices in *Rapanos*." 79 Fed. Reg. at 22,260. But the "*Marks* Rule," provides that "[w]hen 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 v. United States*, 430 U.S. 188, 193 (1977). There is no basis to describe the entirety of Justice Kennedy's concurrence as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id*. Instead, under proper application of *Marks*, "the concurring opinion of Justice Kennedy, and the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court." Hearing Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Environment and Public Works, 109th Cong. 4 (2006) (written

statement of Jonathan H. Adler), *available at*
http://epw.senate.gov/109th/Adler_Testimony.pdf. This means, in general, that mere "adjacency to a *nonnavigable* tributary by itself will not be enough to establish jurisdiction." *Id.* at 5. It also means that "tributaries" cannot be interpreted to "allow[] for the assertion of jurisdiction with little regard for the actual connections between a given ditch, swale, gully, or channel with actual navigable waters." *Id.* The proposed rule violates these principles, particularly in its expansion of *per se* jurisdiction.

In relying on the entirety of Justice Kennedy's opinion, the Agencies appear to count the "votes" and give weight to the reasoning of the Court's dissenting members. But justices who decline to join the Court's holding regarding the resolution of an issue in a case do not shape that holding—a dissent or concurrence (as opposed to a special concurrence), after all, carries no precedential weight. Instead, as *Marks* holds, it is only the positions of "those Members *who concurred in the judgments"* that are relevant. 430 U.S. at 193 (emphasis added). Accordingly, *Rapanos* must be interpreted only on the basis of the plurality opinion and Justice Kennedy's special concurrence, not on the basis of a prediction about the way that the dissenting justices may vote in some hypothetical future case. In other words, the Agencies may not assume that they may justify their actions under *either* opinion; instead, they must accept, *at the least*, that the kinds of assertions of jurisdiction rejected in *Rapanos* are off limits to them. And to be on legal *terra firma*, they should justify their assertion of authority under *both* the plurality's approach and Justice Kennedy's.[2]

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[2] In addition, the Agencies' apparent reliance on the reasoning of one opinion or the other to support different aspects of their proposal is incoherent, given the two opinions' very disparate approaches to interpretation of the CWA's jurisdictional scope. This failure to settle on a single, coherent interpretation is fatal to the Agencies' proposal.

This dispute is far from academic because central features of the proposed rule could only be supported under Justice Kennedy's concurrence. For example, the proposed definition of "tributaries" is undoubtedly irreconcilable with the plurality opinion, for the plurality made clear that "tributaries" are not themselves "waters of the United States." *Rapanos*, 547 U.S. at 743–45 (arguing that tributaries can be "point sources" conveying pollution at the place where they enter "waters of the United States," but not "waters of the United States" themselves). Justice Kennedy's concurrence, on the other hand, finds that some "tributaries" can potentially be "waters of the United States," even though earlier definitions of "tributaries" fail the "significant nexus" test. *Id.* at 781–82 (Kennedy, J., concurring).

Yet other features of the proposed rule could only, or more easily, be justified under the plurality's approach. One example is an aspect of the proposed definition of "adjacent." Because the plurality opinion does not require a "significant nexus" showing, only surface connection, it may allow regulation of "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)." *Id.* at 776 (Kennedy, J., concurring). The plurality opinion may therefore support the "confined surface hydrologic connection" part of the new "neighboring" definition, while Justice Kennedy's approach would seem to require specific showings that the "*per se*" nature of the proposed rule does not.

In sum, only by cobbling together the aspects of each *Rapanos* opinion that they favor can the Agencies find even arguable legal support for all aspects of their proposal. But agencies do not get to pick and choose from among competing and irreconcilable legal approaches. Because the proposed rule cannot be supported under one or the other interpretative approach in *Rapanos*—much less the common ground between the two—it is *ultra vires*.

C. The Proposed Rule Violates Even the Broadest Reading of *Rapanos*

Even if a court were to adopt the Agencies' implicit position that the four-Justice plurality and Justice Kennedy's concurrence together form the controlling *Rapanos* test—that is, that an assertion of jurisdiction that satisfies either standard is permissible—the proposed

rule would still fail. The proposed rule, with its expansive definitions of tributaries and adjacency, and its regional "other waters" analysis, covers numerous bodies of water and swaths of land that cannot be justified under either the four-Justice plurality opinion or Justice Kennedy's concurrence. As such, the proposal exceeds the Agencies' statutory authority under the Clean Water Act.

The proposed rule encompasses areas possessing neither "relatively permanent, standing or flowing bodies of water" with a "continuous surface connection" to navigable waters, nor a "significant nexus" to "waters that are or were navigable in fact or that could reasonably be made so." *Rapanos*, 547 U.S. at 732, 757, 759. For example, a *per se* rule recognizing tributaries as "waters of the United States" is not permitted under the plurality opinion, because the plurality requires a showing that the tributary actually conveys pollution at the point it reaches the navigable waters. *Id.* at 743 (plurality opinion). And the *per se* rule would also not be permitted by Justice Kennedy's concurrence, because it captures "streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* at 781 (Kennedy, J., concurring).

The proposed definitions of "adjacency" and "other waters" also violate even the most generous reading of *Rapanos*. "Adjacency" with its "riparian area" and "floodplain" categories, and "other waters" with its regional analysis, each encompass land and waters not at all bordering proper "waters of the United States," much less possessing a "continuous surface connection." *Id.* at 757. They thus cannot be justified under the plurality opinion. And they also violate Justice Kennedy's concurrence. Given that the concurrence expressed grave doubts about previous efforts by the Agencies, using the narrower definition of "adjacency," to regulate "wetlands adjacent to tributaries . . . little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*," it is inconceivable that the concurrence can be reconciled with a definition of adjacency that includes all waters in "riparian areas." *Id*. at 781–82 (Kennedy, J., concurring).

Nor does Justice Kennedy's concurrence support the proposed rule's "in the region" analysis. It does not directly answer that question because it was "neither raised by these facts nor addressed by any agency regulation." *Id*. at 782 (Kennedy, J., concurring). But Justice Kennedy does suggest that this approach is impermissible. Justice Kennedy would require the Corps to establish that wetlands adjacent to nonnavigable tributaries "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780 (Kennedy, J., concurring). By contrast, the proposed rule allows the agencies to presume that this is the case, without making any specific determination. Accordingly, this approach cannot be supported by Justice Kennedy's reasoning.

In sum, even if the Agencies are correct that they may rely on either of the two opinions that comprise the *Rapanos* majority, their proposed rule is still *ultra vires* because central aspects of it fail to satisfy either standard.

IV. The Proposed Rule Exceeds the Scope of Congress's Commerce Clause Power

In the background of the Court's decisions in *Rapanos* and *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), is the question of the extent of Congress's regulatory authority under the Commerce Clause. In both cases, the Court interpreted the CWA so as to avoid reaching this constitutional question. But the broad reach of the proposed rule—which purports to assert federal regulatory authority over development adjacent to "tributaries" that are dry and on lands that are merely in the "region" of actual waters—not only exceeds the Agencies' statutory authority but also relies on an interpretation of the Act that exceeds Congress's Commerce Clause authority.

In *SWANCC*, the government sought to defend the Corps' "Migratory Bird Rule," which asserted CWA jurisdiction over intrastate waters that provide habitat for migratory birds, on the basis that "the protection of migratory birds is a 'national interest of very nearly the first magnitude'" due to the amount of money spent on bird-related recreation and therefore well within "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." 531 U.S. at 173. The Court, however, had its doubts: "For ex-

ample, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear . . . ." *Id.* As it explained, "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. Whether or not it was within Congress's power to so impinge on the States' traditional authority, the Court assumed that Congress would have made some "clear statement" "expressing a desire to readjust the federal-state balance in this manner" before undertaking an action so fraught with constitutional doubt. *Id.* Accordingly, it "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation." *Id.*

Likewise, the plurality in *Rapanos* recognized that "[r]egulation of land use, as through the issuance of the development permits . . ., is a quintessential state and local power" and that "[t]he extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land." 547 U.S. at 738. It too applied the avoidance canon, reasoning that it would "ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Id.* To do otherwise would force the Court to confront "difficult questions about the ultimate scope of [Congress's commerce] power." *Id.*

Presumably a federal court could and would apply the same avoidance canon and clear statement rule in rejecting the interpretation set forth in the proposed rule. But that does not mean, of course, that the Agencies' interpretation can be supported under the Constitution—to the contrary, the application of the avoidance canon in both *SWANCC* and *Rapanos* suggests substantial doubt on that score, which is confirmed by application of basic Commerce Clause principles.

In particular, the Supreme Court has "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968). The assertion of federal authority to regulate basic land-use requirements in entire regions of

the nation—and perhaps the entire region, if the Agencies' approach is carried out to its logical end—"would erode those limits, permitting Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'" *NFIB v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) (quoting The Federalist No. 48, at 309 (J. Madison)). For that reason alone, the Agencies' interpretation must be rejected.

More specifically, the Agencies' interpretation cannot be supported as a regulation of activities "substantially related" to interstate commerce. The Supreme Court has "identified three broad categories of activity that Congress may regulate under its commerce power": Congress may regulate "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce," and "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (citations omitted). The regulation of land and water resources that does not involve navigable waterways, if it is within Congress's authority at all, would have to fit within the third category.

But the Court's decisions in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), prohibit the federal government from regulating noneconomic intrastate activities that have only an attenuated connection to interstate commerce. As in *Lopez*, the statute at issue here "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. As relevant, the CWA prohibits discharges into "the waters of the United States" without a permit issued by the federal government. This prohibition, as with the firearm-possession statute in *Lopez* and the civil remedy for the victims of gender-motivated violence in *Morrison*, does not directly regulate commercial activity. While a property owner may certainly hire a contractor to apply fill to a portion of his property, the prohibition does not address that commercial transaction and applies equally to the property owner doing the work himself—or, for that matter, to a toddler with a bucket and shovel tossing dirt into a puddle. The CWA also lacks an express "jurisdictional element which would ensure,

through case-by-case inquiry, that the [regulated activity] affects interstate commerce." *Id.* Thus, the prohibition itself is not a regulation of economic activity. "[T]hus far in our Nation's history [the Supreme Court's] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. On that basis, a court would be constrained to reject the Agencies' interpretation of the CWA as exceeding Congress's Commerce Clause power.

Legislative history likewise provides no support for the argument that Congress considered "the effects upon interstate commerce" of the CWA's prohibitions. *See Lopez*, 514 U.S. at 562–63. Indeed, the Supreme Court considered and rejected in *SWANCC* the argument "that Congress intended to exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3.

In sum, the Agencies' interpretation must be rejected because it "would effectually obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557 (internal quotation marks omitted).

V. The Proposed Rule Is an Effort by the Agencies To Supplant State Law and Replace the Policy Choices of the People Most Directly Affected by Regulations and Waters with the Policy Preferences of Federal Bureaucrats

The proposed rule is a thinly veiled attempt by the Agencies to undermine democratically enacted state and local laws and policies. If finalized, the rule will replace the judgments of those most knowledgeable of local needs—who also happen to be those most directly burdened by clean water regulations—with the wishes and desires of federal bureaucrats. Such a usurpation of states' rights violates the CWA's scheme of cooperative federalism and thus the CWA itself.

A. The Proposed Rule Seeks To Supplant State and Local Laws with Federal Control

The Agencies claim that the proposed rule "[h]elps states protect their waters." United States Environmental Protection Agency, *Waters of the United States*, *available at* http://www2.epa.gov/uswaters (last visited Nov. 12, 2014). But by "states," the Agencies

mean their state-level bureaucratic counterparts. And the "help" the Agencies think States need is help circumventing democratically enacted statutory limitations on the state bureaucrats' discretion. Indeed, one need look no further than the title of the source the Agencies cite to see their true intentions: *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* (Environmental Law Institute, May 2013), *available at* http://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf (last visited Nov. 12, 2014) ("*State Constraints*").

Examining the "state-imposed limitations" that the Agencies find so troubling is revealing. These limitations, as the *State Constraints* report chronicles, come in two forms: "no more stringent than" laws and private property-rights laws. "No more stringent than" laws are "laws or policies that limit the authority of state agencies to protect waters more stringently than would otherwise be required under the federal Clean Water Act." *State Constraints*, at 11. Evidently twenty-eight States have determined that federal clean water regulations as they exist without the Agencies' attempt at jurisdictional expansion are sufficient—or, indeed, more than sufficient—to protect their waters, and have adopted "no more stringent than" laws. *Id.*

Laws protecting rights to private property, the existence of which the Agencies also seem to regret, are "legal protections, often in the form of 'private property rights acts,' for the benefit of property owners whose rights are affected by state government action—often including local government action." *Id.* at 20. The principal form such laws take is "assessment provisions," which "require state government officials to assess their actions for potential constitutional takings implications, or for other impacts on private property rights." *Id.* at 24. The other predominant form of laws protecting rights to private property is "compensation/prohibition" provisions, which "require[] state agencies to pay certain private property owners who successfully claim that government regulation has resulted in a devaluation of their property." *Id.* at 21. All told, twenty-two States have adopted property-based limitations on the authority of regulatory agencies, often through voter ballot initiatives.

The Agencies, deeming bureaucratic discretion superior to the express will of the democratic populous, are proposing this rule to supplant such state and local laws. As shown below, that runs contrary to the policies that Congress sought to further in enacting the CWA.

B. The Agencies' Attempt To Supplant State Authority Contravenes the CWA's Policy of Deference to States

The opening section of the CWA in which Congress specifies the statute's goals and purposes clearly adopts a scheme that respects the rights of States. "It is the policy of the Congress," the CWA declares, "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) (emphasis added). Congress then goes on to order that "[f]ederal agencies *shall co-operate with* State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution . . . ." 33 U.S.C. § 1251(g) (emphasis added). Yet despite these explicit articulations of congressional purpose, the Agencies have chosen to adopt an approach that is decidedly un-cooperative.

Rather than impose top-down regulation, the Agencies should respect the water-management policies adopted by those who have the "primary responsibilities and rights" to make such determinations.

VI. The Proposed Rule Undermines Rights to Property and Potentially Exposes Individuals to Severe and Costly Civil and Criminal Penalties on Account of the Arbitrary Decisions of Bureaucrats

Expanding the Agencies' jurisdiction over our country's waters has grave consequences for individuals' liberty and right to property. As the Supreme Court has observed, the Agencies exercise their authority to grant permits under the CWA with "the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'" *Rapanos*, 547 U.S. at 721 (plurality opinion) (quoting 33 C.F.R. § 320.4(a)). Successfully navigating the bureaucratic process to

receive such a permit can be expensive and time consuming—"[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Id.* All the while, one risks coming out empty handed, unable to satisfy the economic judgments or aesthetic tastes of the Agencies' officials. Even a brief survey of recent CWA cases demonstrates that widening the scope of the Agencies' jurisdiction imperils individual liberty and rights to property.

A. The Proposed Rule Is an Assault on Rights to Property

The Agencies are quite clear that they consider rights to property an obstacle to their regulatory pretensions. The *State Constraints* report commissioned by the Agencies and cited to justify the proposed rule describes rights to property as "set[ting] up a series of hurdles" to regulation. *State Constraints*, at 30. More troubling still, the report warns that property-based limitations can create "additional political scrutiny [of agency discretion] that could call into dispute the agency's scientific judgments." *Id*. Such obstacles and public oversight, the report concludes, create a "gap" that the federal government needs to fill. *Id*. at 5.

So what problems, exactly, do the Agencies have with rights to property? For one, laws that prevent individuals *qua* individuals from bearing rightfully public burdens "limit some forms of new environmental regulation, as state agencies cannot afford to pay owners as a condition of having their regulations enforced." *State Constraints*, at 20–21. Other laws protecting rights to property, such as assessment requirements, "create *additional processes* for an agency to follow when a proposed regulation is likely to affect private property rights." *Id*. at 21 (emphasis added). Still others "enhance property owners' ability to contest state regulation affecting their property." *Id.* In short, it would seem that the Agencies' grievances with rights to property boil down to the fact that those rights are a check on the Agencies' unfettered authority.

But rights to property are essential to—indeed, coextensive with—liberty and freedom precisely because they provide the check on governments that the Agencies so lament. It was in recognition of the important role property has in preserving our freedoms that the

Founders to saw fit to ratify the Fifth Amendment, providing that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Agencies' proposed rule is antithetical to this fundamental, natural right, and must accordingly be rejected.

B. Expanding the Agencies' Jurisdiction Further Exposes Individuals to the Whims of Federal Bureaucrats

CWA compliance imposes a massive burden on property owners, and interacting with the Agencies in the exercise of their CWA can be a costly and dangerous undertaking. After all, they have as an enforcement mechanism the threat of "a fine of not less than $5,000 nor more than $50,000 *per day* of violation, or by imprisonment for not more than 3 years, or by both." 33 U.S.C. § 1319(c)(2)(B) (emphasis added).

But just how burdensome the Agencies' enforcement regime is does not come into focus until one considers concrete examples. Lois Alt, the owner of Eight Is Enough Farm in Old Fields, West Virginia, has been engaged in a lengthy legal battle with the EPA. Ms. Alt owns "eight poultry confinement houses equipped with ventilation fans, a litter storage shed, a compost shed and feed storage bins." However, she violated the CWA when "[p]recipitation [fell] on Ms. Alt's farmyard, where it contacted the particles, dust and feathers from the confinement houses, creating runoff that carried such particles, dust and feathers across a neighboring grassy pasture and into Mudlick Run, a water of the United States." *Alt v. EPA*, 979 F. Supp. 2d 701, 704 (N.D. W. Va. 2013). Because Ms. Alt did not have a permit for such discharges, the "EPA said that it could bring a civil action against Ms. Alt for this violation, in which case Ms. Alt 'will be subject to civil penalties of up to $37,500 per day of violation'" and further that "a criminal action could be initiated." *Id.* at 705.

Or one could discuss the case of David Hamilton in Worland, Wyoming, who wanted to grow crops on part of his property. To free up space, he diverted a "meandering" creek on his property into "a new, straightened channel," also on his property, without an EPA

permit. *United States v. Hamilton*, 952 F. Supp. 2d 1271, 1272 (D. Wyo. 2013). Diverting the creek, it turned out, constituted discharging a pollutant from a point source under the CWA, so the EPA ordered Hamilton to "remove the fill material from Slick Creek and restore it to its previous condition" at his own expense. *Id.*

Application of CWA procedures recently prompted a unanimous rebuke from the Supreme Court in the *Sackett* case. For filling in part of their residential lot near a lake with rock and sand in preparation for building a home, the Sackett family found themselves in the undesirable position of facing potentially $75,000-a-day in EPA fines for violating the CWA. *Sackett*, 132 S. Ct. at 1372. When the Sacketts asked for a hearing to challenge the EPA's finding that their land is covered by the term "waters of the United States"—land, it should be noted, that was separated from the nearby lake by several other lots "containing permanent structures"—the EPA refused their request. *Id.* at 1370-71. It was only by taking their case to the Supreme Court that the Sacketts were ultimately able to vindicate their right simply to challenge the EPA determination in court.

Broad CWA jurisdiction can also pose a trap for the unwary. For example, James Wilson, a developer in Maryland, worked in partnership with the United States Department of Housing and Urban Development to build a development that included 10,000 housing units, parks, and schools. *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997). On three of the parcels in the 4,000 acre development, Mr. Wilson had ditches dug so he could build on them. Even though Mr. Wilson worked with the federal government, and the Army Corps authored a memorandum stating that it is "not clear" the land was a "water of the United States," he was eventually convicted on four felony counts for knowingly violating the CWA. *Id.* at 255. His conviction was overturned on appeal.

As these cases and countless others illustrate, the Agencies often exercise their regulatory muscles arbitrarily and to the detriment of individual liberty. Because the Agencies have such severe penalties at their disposal, and inadequate judicial checks on their discretion, the Agencies' jurisdiction should be limited, not expanded. The Agencies' proposal not

only moves policy in the wrong direction, it also fails to adequately consider the impact of expanded CWA jurisdiction on rights to property and fails to consider the burden that its approach would impose on property owners.

VII. Conclusion

If finalized, the Agencies' proposed redefinition of "waters of the United States," particularly the proposed definitions of "tributaries," "adjacent," and "other waters," will significantly expand their jurisdiction. Such an expansion would subvert the principles of federalism, rights to property, and individual liberty, in addition to violating the CWA itself. The proposed rule should be scrapped, and the Agencies should draft a new proposal that conforms to the limits of their authority as stated by the *Rapanos* plurality, that provides much-needed clarity to citizens and regulators, and that respects and strengthens rights to property.

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