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The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable John M. McHugh
Secretary
Department of the Army
The Pentagon, Room 3E700
Washington, D.C. 20310

**Re: Comments on the Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880)**

Dear Administrator McCarthy and Secretary McHugh,

As the Missouri Attorney General, I submit the following comments on the proposed rule "Definition of Waters of the United States Under the Clean Water Act". 79 Fed. Reg. 22,188 (April 21, 2013).

The Clean Water Act of 1972 grants EPA and the Army Corps of Engineers regulatory authority over "waters of the United States." 33 U.S.C. §§ 1344, 1362(7). Initially, the Corps interpreted its authority under the CWA narrowly to include only "interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos v. United States*, 547 U.S. 715, 723, (2006) (plurality opinion) (citing 39 Fed. Reg. 12119, codified at 33 CFR § 209.120(d)(1)). Over time, however, the Corps' reading of the CWA has stretched to the limits of Congress's authority under the Commerce Clause. *Id.* at 724 (citing 40 Fed. Reg. 31,324-31,325 (1975); 42 Fed. Reg. 37,144 & n.2 (1977)).

Although the Supreme Court accepted the Corps' claim in 1985 that the CWA extends to wetlands that "actually abut[] on" traditional navigable waters, *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), more recent decisions have narrowed the statute's reach

considerably. In *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, for example, the Supreme Court held that the CWA does not reach non-navigable, intrastate waters "[w]hich are or would be used as habitat" by migratory birds. 531 U. S. 159, 171 (2001). The Court was concerned that extending the Corps' jurisdiction to isolated, seasonal ponds would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power," raising "significant constitutional questions" about Congress's Commerce Clause power. *Id.* at 172.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Court rejected a similar attempt by the Corps to regulate wetlands adjacent to non-navigable tributaries of core waters. Writing for a plurality of the Court, Justice Scalia concluded that ''waters of the United States'' covers only ''relatively permanent, standing or continuously flowing bodies of water'' and secondary waters, which have a "continuous surface connection" to these relatively permanent waters. *See* 547 U.S. at 739-42. Concurring in the plurality's judgment, Justice Kennedy interpreted the CWA to reach only "navigable waters" and those secondary waters with a "significant nexus" to navigable waters. *Id.* at 579. According to Justice Kennedy, a "significant nexus" exists only as to wetlands that "significantly affect the chemical, physical, *and* biological integrity of other covered waters understood as navigable in the traditional sense." *Id.* at 780 (emphasis added). The Proposed Rule cannot be justified under either Justice Scalia's plurality opinion or Justice Kennedy's concurrence because it purports to reach intrastate wetlands, intermittent or ephemeral tributaries, "adjacent" waters, riparian areas, and floodplains without a continuous surface connection or a significant nexus to a core water.

As the Supreme Court explained in *Solid Waste Agency*, Congress intended to preserve the States' historical primacy over the management and regulation of intrastate water and land management when it enacted the Clean Water Act, expressly requiring federal agencies to "recognize, preserve, and protect the *primary responsibilities and rights of States* . . . to plan the development and use . . . . of land and water resources . . . ." 33 U. S. C. § 1251(b) (emphasis added). The Proposed Rule is inconsistent with Congressional intent and should be revised.

Respectfully,

**CHRIS KOSTER**
Attorney General