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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

September 16, 2014

Administrator Gina McCarthy
Environmental Protection Agency
Mail Code 28227
1200 Pennsylvania Avenue NW
Washington, DC 20460

Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: "Waters of the United States" Rulemaking
Docket No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

We are the attorneys general of seven states and the District of Columbia, and we write to voice our support of the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) defining the scope of the "waters of the United States" protected under the Clean Water Act. *See* 79 Fed. Reg. 22188 (April 21, 2014).

The proposed rule is an important action to advance the statute's objective "to restore and maintain the chemical, physical and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a). The rule would establish clear categories of waters within the protection of the law by defining "waters of the United States" to include tributaries and adjacent waters (such as wetlands), along with traditional navigable waters, interstate waters, and the territorial seas. The rule is based on sound science, and takes into account the practical and ecological realities of our Nation's interconnected waters. It promotes the consistent and efficient implementation of

State water pollution programs across the country in accordance with the principles of “cooperative federalism” on which this landmark statute is based. We support the proposed rule for three reasons.

First, the proposed rule is grounded in peer-reviewed scientific studies that confirm fundamental hydrologic principles. Water flows downhill, and connected waters, singly and in the aggregate, transport physical, chemical and biological pollution that affects the function and condition of downstream waters, as demonstrated by the many studies on which EPA and the Corps rely. The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Comprehensive coverage under the CWA of these ecologically connected waters is essential to achieve the water quality protection purpose of the act.

Second, the proposed rule advances the statute’s protection of state waters downstream of other states by securing a strong federal “floor” for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states’ water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution. Of note is the fact that all of the lower forty-eight states have waters that are downstream of the waters of other states. By protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state sources to offset upstream discharges which might otherwise go unregulated.

Third, by clarifying the scope of “waters of the United States,” the proposed rule would promote predictability and consistency in the application of the law, and in turn help clear up a confusing body of case law that has emerged. Since the Supreme Court’s plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are “waters of the United States” and therefore within the Act’s jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain CWA jurisdiction, with some courts adopting Justice Kennedy’s significant nexus test, some adopting the plurality’s test, and some tending to defer to the agencies’ fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for Agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act’s

application. The proposed rule's clear categories of waters subject to the Act would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would be of benefit to the states because it would ease some of the administrative burden of having to make many fact-based determinations employing uncertain tests. In this regard, in the rulemaking the agencies have requested comments as to how a final rule could ease that burden further.

For these reasons we express our support for EPA's and the Corps' proposed rules defining the scope of waters protected under the CWA, and urge its promulgation by the agencies.¹



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¹ While the undersigned attorneys general support the proposed rule, they may object to other aspects of the proposal or the agencies' rationale for it and, accordingly, reserve their rights concerning such objections.

cc: Ken Kopocis, EPA Assistant Administrator for Water
Avi S. Garbow, Esq., EPA General Counsel
Chief Counsel, Army Corps of Engineers
Water Docket