ATTORNEY GENERAL OF MISSOURI
ERIC SCHMITT

June 15, 2021

Michael S. Regan, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Jaime A. Pinkham
Acting Assistant Secretary of the Army for Civil Works
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Re: "Turtles All the Way Down"

Dear Administrator Regan and Acting Assistant Secretary Pinkham:

In response to your recent announcement that EPA and the Army Corps of Engineers intend to revisit the Navigable Waters Protection Rule, I write to remind you of the statutory limits on your authority to engage in nationwide land-use regulation under the aegis of regulating "waters of the United States." I urge you to reject the fundamentally lawless approach of treating vast tracts of land in the interior of the United States as "waters."

As your announcement acknowledges, the Clean Water Act confers only specific, limited authority on your agencies. In particular, it permits the regulation of "navigable waters," where "[n]avigable waters are defined in the Act as 'the *waters* of the United States, including the territorial seas.'" Press Release, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus ("WOTUS Announcement") (emphasis added).

Thus, EPA and the Army Corps have authority to regulate only "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362(7). Beyond this specific, limited authority, EPA and the Army Corps have no jurisdiction to impose land-use and permitting requirements on Americans – that authority is vested in the States, not the federal government. *See* 33 U.S.C. § 1251(b) ("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….").

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Justice Scalia's controlling opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), aptly describes EPA's and the Army Corps' ever-expanding interpretations of "navigable waters" and "waters of the United States" as one of the most egregious examples of agency mission creep in the history of the federal administrative state. As Justice Scalia noted, an "immense expansion of federal regulation of land use … has occurred under the Clean Water Act—without any change in the governing statute—during the past five [now seven] Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning." 547 U.S. at 722 (plurality op.) (Scalia, J.). "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." *Id.* "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." *Id.*

In fact, the history of your agencies' interpretation of "waters of the United States" undermines the very concept of *Chevron* deference. "In applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody." *Id.* at 733-34. "The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Id.* at 734.

Your agencies have a history of resistance to judicial attempts to rein in this expansive view of their own authority. As Chief Justice Roberts wrote in *Rapanos*, "[r]ather than refining its view of its authority in light of [the Supreme Court precedents], and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power." *Id.* at 758 (Roberts, C.J., concurring); *see also Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring) ("[T]he EPA and the Army Corps … interpreted ['waters of the United States'] as an essentially limitless grant of authority. We rejected that boundless view ….") (gathering examples).

The Trump Administration worked to abandon that lawless course of continuing to expand federal jurisdiction beyond any warrant in the statute's plain text. *See* Exec. Order No. 13,778, § 3. You should do the same. Under the plain terms of the statute, EPA's and the Corps' authority is *not* "essentially boundless." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). Rather, it is limited to "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362(7).

Justice Scalia's authoritative opinion in *Rapanos* elucidates the plain meaning of those phrases in compelling detail. "Water***s***" in the plural does not mean "water," or "anywhere water flows." Rather, "waters" "refers more narrowly to water 'as found in streams and bodies forming geographical features such as oceans, rivers, and lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" *Id.* at 732 (Scalia, J.) (alterations omitted)

(quoting WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)). The definition's reference to "territorial seas," *see* 33 U.S.C. § 1362(7), confirms that such waters forming permanent "geographical features" are what is intended by "waters," *see Rapanos*, 547 U.S. at 733 (plurality opinion).

"Waters of the United States" are thus permanent "geographical features" or *bodies* of water—not any land where water sometimes flows during rain or floods, such as storm drains or dry channels. *Id.* "[O]n its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 739 (quoting WEBSTER'S SECOND 2882) (alterations omitted).

Moreover, "adjacent" wetlands are not "waters of the United States" unless they have a "continuous surface connection" with a covered "water" such that the wetland blends into—and thus forms part of—the covered water. *Id.* at 742. That is, "*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*, are 'adjacent to' such waters and covered by the Act." *Id.* (second emphasis added). It is only this "boundary-drawing problem" that permits wet*lands* to be treated as "waters" at all: "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of [*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)], and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in [*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*)]." *Id.*

A wetland is subject to federal jurisdiction, therefore, only if it meets two independent requirements: "[F]irst, that the adjacent channel contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

As Justice Scalia explained, several principles of statutory interpretation mandate this narrower interpretation of EPA's and the Corps' authority. First, the plain meaning and dictionary definition of the word "waters" mandates the result. *See id.* at 732–33. Second, the context and structure of the Act require this result. Typically dry channels, pipes, conduits, and arroyos in the desert are not "waters of the United States" because the Act defines such conveyances separately as "point sources," and it is clear that the Act's "definitions … conceive of 'point sources' and 'navigable waters' as separate and distinct categories." *Id.* at 736.

Third, your agencies' overbroad interpretation of "waters of the United States" pushes their authority to the outer limits of the Commerce Clause. Such interpretations require clear authorization from Congress, which is absent here: "Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." *Id.* at 738.

Fourth, that interpretation avoids trampling on the States' traditional authority over land-use regulation, and thus it is the only approach consistent with principles of federalism. "The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." *Id.* at 738 (citing 33 CFR § 320.4(a)(1) (2004)). "We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority," and "[t]he phrase 'waters of the United States' hardly qualifies." *Id.* (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).

Indeed, your agencies' expansive interpretations of "waters of the United States" violated the principles of federalism that the Act expressly codifies. In the Clean Water Act, Congress explicitly intended "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). Congress's recognition of the *States*' primary jurisdiction and responsibility in this area is well-founded in our system of federalism. "Regulation of land use ... is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (Scalia, J.). But an expansive reading of "waters of the United States," "rather than 'preserving the primary rights and responsibilities of the States,'" would vest such authority in the federal government and is therefore an unlikely reading of the phrase "the waters of the United States." *See id.* at 737.

Not only does Justice Scalia's opinion provide a compelling interpretation of "waters of the United States," it also provides the legally binding interpretation of that phrase. As Chief Justice Roberts noted in *Rapanos*, 547 U.S. at 758, the separate opinions in *Rapanos* are to be assessed under the Supreme Court's guidance in *Marks v. United States*, 430 U.S. 188, 193 (1977), reaffirmed in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). That rules says: "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*." *Grutter*, 539 U.S. at 325 (quoting *Marks*, 430 U.S. at 193) (emphasis added).

Justice Scalia's opinion provides the "narrowest grounds," *id.*, for resolving the issue in *Rapanos*, because that opinion takes the narrowest interpretation of the statute and the narrowest view of federal jurisdiction—indeed, the only view that is consistent with longstanding principles of federalism. Indeed, at least eight Justices in *Rapanos* explicitly agreed that Justice Scalia's approach was the narrowest. Justice Scalia's four-Justice plurality opinion repeatedly described his approach as "narrow[]," "narrower," and "narrowing," 547 U.S. at 716, 732, 745, 745 (Scalia, J.); and Justice Stevens' four-Justice dissent also repeatedly described that approach as "narrow" and "narrowed," *id.* at 794, 795 (Stevens, J., dissenting).

And that is so because Justice Scalia's plurality opinion is a logical subset of Justice Kennedy's "significant nexus" requirement. *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in judgment) (concluding that wetlands with a "significant nexus" to jurisdictional waters are "waters of the United States"). Virtually all wetlands with a continuous surface connection to a jurisdictional water, such that "there is no clear demarcation" between the two,

have a "significant nexus" to the navigable water because they are *part* of that navigable water. But not all wetlands with a "significant nexus" (whatever that means) to a navigable water will have a continuous surface connection such that the boundaries between the two are indistinguishable. *See id.* at 772 (Kennedy, J., concurring in judgment) (rejecting "[t]he plurality's second limitation"). Indeed, Justice Kennedy's test "is not likely to constrain an agency" at all, *see id.* at 756 n.15 (Scalia, J.)—as your agencies have demonstrated by repeatedly invoking it to expand their authority. And as Justice Stevens said in his dissent, with notable understatement, it is "unlikely" that there is any case where "the plurality's test is met but Justice Kennedy's is not." *Id.* at 810 n.14.

Moreover, *not* adopting Justice Scalia's narrower interpretation would raise constitutional problems. As noted above, adopting Justice Kennedy's "significant nexus" test risks allowing agencies to regulate to the limit—and beyond—of their constitutional authority, something Congress did not clearly authorize. *See SWANCC*, 531 U.S. at 174 ("We thus read the [Clean Water Act] to avoid significant constitutional and federalism questions...."). Justice Scalia's plurality opinion is narrower than Justice Kennedy's concurring opinion, and so it is the controlling opinion that binds your agencies.

To be sure, in the aftermath of *Rapanos*, lower courts have come to differing conclusions on whether Justice Scalia's opinion, Justice Kennedy's concurrence, or both, provides the controlling opinion in *Rapanos*.[1] But such disagreement is unwarranted. Justice Scalia's opinion plainly sets forth the "narrowest grounds" for the Court's judgment, *Marks*, 430 U.S. at 193, under any plausible sense of the word "narrow." Your agencies should follow the Supreme Court's instructions in *Marks* and conclude that Justice Scalia's opinion is binding authority for all future rulemakings and other agency actions involving the "waters of the United States."

Unfortunately, your recent announcement provides no assurance that your agencies have returned to the statutory roots of their authority. On the contrary, your statement contains troubling signals that you intend to return to your former, ill-advised approach of attempting to push the limits of your authority to their constitutional limits—and beyond.

For example, Acting Assistant Secretary Pinkham stated as a reason to revisit the more limited Navigable Waters Protection Rule that it "has resulted in a 25 percentage point reduction in determinations of waters that would otherwise be afforded protection." WOTUS Announcement, at 1. *See also id.* (noting that "[t]he agencies are also aware of 333 projects that would have required Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer do"). But that only matters if *any* reduction in your agencies' sweeping authority is a bad thing that must be rejected. The fact that the Navigable Waters Protection Rule reduces the scope

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[1] *See, e.g.*, *United States v. Lipar*, 665 F. App'x 322, 325 (5th Cir. 2016) (per curiam); *United States v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006).

of agency jurisdiction is a sign that it hews more closely to the agencies' limited statutory authority—yet you seem to think that any reduction in your authority is *per se* invalid.

You also announce that "[t]he lack of protections is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional." *Id.* But "arid" regions—*i.e.*, deserts—are not "waters of the United States" or "territorial seas" under any stretch of one's textual imagination. Thus, your objection to the prior rule that "arid states" are not treated as "waters of the United States" "portrays most vividly the absurdity" of your statutory interpretation. *Rapanos*, 547 U.S. at 727 n.2 (Scalia, J.); *see also id.* ("Captain Renault: 'What waters? We're in the desert.' Rick Blaine: 'I was misinformed.'") (quoting *Casablanca* (Warner Bros. 1942)). Regardless of your policy preferences, Congress has simply not enacted "a Comprehensive National Wetlands Protection Act." *Id.* at 745.

In sum, your agencies seem determined to return to their longstanding course of asserting ever-expanding theories of their own power, beyond any possible warrant in the text of the Clean Water Act. This approach is fundamentally lawless. It piles unsupported inference upon unsupported inference, starting with (1) the unpersuasive adoption, of (2) a non-textual test ("significant nexus"), (3) in a non-binding separate opinion (Justice Kennedy's *Rapanos* concurrence), (4) which is drawn—not from the statutory text—but from a prior opinion of the Court (*SWANCC*), (5) which itself was not purporting to set forth the statutory test at all, but was merely providing a "cryptic characterization" of the holding of yet another prior opinion of the Court (*Riverside Bayview Gardens*), all (6) without any mooring to the plain language of the Clean Water Act. *See Rapanos*, 547 U.S. at 755 (Scalia, J.).

"Truly, this is 'turtles all the way down.'" *Id.* at 754.

Sincerely,

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