February 7, 2022

Hon. Michael S. Regan, Administrator
Environmental Protection Agency
Docket EPA-HQ-OW-2021-0602
1200 Pennsylvania Avenue NW
Washington, DC 20460

Hon. Christine Wormuth, Secretary of the Army
Department of the Army
Docket EPA-HQ-OW-2021-0602
The Pentagon
Washington, Dc 20310

Dear Mr. Administrator and Madam Secretary:

RE: EPA and Department of the Army Notice of Proposed Rulemaking Titled "Revised Definition of 'Waters of the United States'," Docket EPA-HQ-OW-2021-0602, 86 *Fed. Reg.* 69372 (December 7, 2021)

This letter presents the comments of the American Legislative Exchange Council (ALEC) in response to the Environmental Protection Agency (EPA) and Department of the Army notice of proposed rulemaking titled "Revised Definition of 'Waters of the United States," Docket Number and citation to the Federal Register listed above. The American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets, and federalism. Comprised of nearly one-quarter of the country's state legislators, ALEC members represent more than 60 million Americans.

ALEC opposes the proposed definition and asks the EPA and Army to withdraw the proposed rule or, at least, hold finalization in abeyance until the U.S. Supreme Court issues a decision in *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted* ___ S.Ct. ___, 2022 WL 1999378 (Mem), 22 Cal. Daily Op. Serv. 808 (limiting write to question of "[w]hether the Ninth Circuit set forth the proper test for determining whether wetlands is "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).[1]

The Clean Water Act (CWA)[2] and implementing regulations of the past four decades recognize the partnership between federal, state, and local governments to achieve the objectives of the Act. Section 101(g) of the CWA expressly states that it is "the authority of each state to allocate quantities of water within its jurisdiction [that] shall not be superseded, abrogated, or otherwise impaired by this Act."[3] Considering under the proposed rule that areas with no navigable waters, or even permanent water flows, would be subject to federal jurisdiction, if enacted, state jurisdiction will clearly be superseded, abrogated, and otherwise impaired.

[1] The Supreme Court appears to be asking the parties to address two distinct, but related, sub-questions: 1. What is the test for determining when a "wetland" may be considered a "water"; and 2. What is the test for determining when a wetland-water may be considered among the "navigable waters" subject to Clean Water Act regulation. Of necessity, the parties will need to address the reasonableness of the EPA's understanding of the "waters of the United States."

[2] *E.g.* 33 U.S.C. §§ 1251, 1311, 1344, 1362.

[3] *See* 33 USC § 1251(b), (g) and *Rapanos v. U.S.*, 547 U.S. 715, 736-737 (plurality opinion, noting that definitions of "waters of the United States" "point sources" and "discharge" would need to exclude waters that intermittently flow to be consistent with the CWA's stated Congressional policy "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.")

As it stands, the proposed rule provides almost unlimited CWA federal jurisdiction, impairing state authority, and contravening congressional intent regarding the limits of federal jurisdiction. The proposed rule will apply to all programs of the CWA and therefore subject more activities to CWA permitting requirements, National Environmental Policy Act (NEPA) analyses, mitigation requirements, and citizen suits challenging local actions based on the applicability and interpretation of new-found authorities.

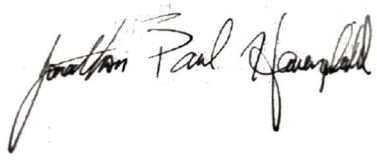
The proposed definition contradicts several Supreme Court rulings recognizing the roles and responsibilities of state governments, not the least of which is *Rapanos v. U.S.*, 547 U.S. 716 (2006). The EPA and Army's proposed, expansive definition would abrogate state and local jurisdiction, effectively "imping[ing] of the States' traditional and primary power over land use."[4]

The EPA and Army lack Congressional authority to override state jurisdiction through its proposed definition. When the Court rejected a prior expansive definition, it stated that it would "ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase "the waters of the United States" hardly qualifies."[5]

The "substantial nexus" test upon which the Agency relies does not justify its abrogation of state authority. First, the substantial nexus test was rejected by the plurality decision in *Rapanos* as "mischaracterization" of the Court's prior precedent.[6] Second, to the extent that the Court mentioned a "substantial nexus" it required the "substantial nexus *of physical connection*, which as a practical matter makes them *indistinguishable* from waters of the United States."[7]

Congress passed the Clean Water Act for multiple purposes. The first, of course, is to ensure clean water, but that "is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions." Just as Justice Kennedy's substantial nexus "test takes no account of this purpose," the EPA and Army's proposed rule would completely abrogate state responsibility. Because of this, the definition is inconsistent with the plain text of the CWA. ALEC strongly opposes the proposed rule and asks the EPA and the Army withdraw it, or, alternatively, hold the rule's finalization in abeyance until there is further guidance from the U.S. Supreme Court Case in *Sackett v. EPA*.

Sincerely,



Jonathon Paul Hauenschild, J.D.
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L. Joseph Trotter III
Director, Energy, Environment, and Agriculture Task Force

[4] *Rapanos*, 547 U.S. at 738.
[5] *Id.*
[6] *Id.,* 547 U.S. at 754.
[7] *Id*. 547 U.S. at 755 (emphasis mixed, both added and original)