ATTORNEY GENERAL
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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

Submitted electronically via Regulations.gov

Re: Comments of Montana Attorney General On the Proposed Definition of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880)

Dear Administrator McCarthy and Secretary McHugh:

As chief legal officer of Montana, I believe the referenced rule-making proposal exceeds your agencies' rule-making authority, with the effect of impinging improperly on our State's sovereignty. I hereby concur and join in the comments submitted to you in this docket by the Attorneys General of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina and South Dakota, and the Governors of Iowa, Kansas, Mississippi, Nebraska, North Carolina and South Carolina, but felt it would be useful to explain my additional concerns based on our State's unique situation.

We are a headwaters state blessed with waters of exceptional quality, and the people of Montana have taken steps to fully protect that priceless resource for ourselves, our downstream neighbors, and all of our progeny. Those steps begin with our state constitution, which declares "[A]ll surface, underground, flood, and atmospheric waters within the boundaries of the state" to be the property of the state for the use of its people (Mont. Const. art. IX, § 3(3)), and requires the legislature to "provide adequate remedies for the protection of the environmental life support system from degradation" and to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. art. IX, § 1(3). These constitutional safeguards are implemented by means of the Montana Water Quality Act, Mont. Code Ann.

§ 75-5-101, *et seq*., a comprehensive water quality protection law enacted in 1971. The Montana Board of Environmental Review has promulgated regulations to implement the legislation, and the statutes and the regulations are implemented by the Montana Department of Environmental Quality.

As you know, Montana sought and was granted primacy to implement the National Pollutant Discharge Elimination System permit system in our State, but even beyond the NPDES (MPDES in Montana) permit protections, the Montana DEQ has broad authority to enjoin pollution of state waters or the placement of waste where it will cause pollution, to require cleanup of any material which may pollute state waters, and to inspect and require monitoring to prevent pollution. Mont. Code Ann. § 75-5-601 et seq.

The point is that Montana has taken primary responsibility for its land and waters as was assumed by Congress when it enacted the Clean Water Act (33 U.S.C. § 1251(b)). The laws and regulations we implement and enforce assure the protection of the quality of traditional navigable waters in and flowing from our State. There accordingly is no justification, in terms of protection of the nation's navigable waters, for extending the reach of the Clean Water Act.

Your proposal states at least twice (Federal Register, Vol. 79, No. 76, at 22189, 22192) that, pursuant to the U.S. Supreme Court decisions in *SWANCC* and *Rapanos*, the scope of regulatory jurisdiction of the CWA in the proposed rule is narrower than that under the existing regulations. It appears this remarkable assertion is based on the observation, at page 22192, that the proposal would delete the "all other waters" subsection in the rule. However, the rules which would replace the deleted subsection, including the provisions containing new definitions for "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus", as well as providing for inclusion of "other waters" on a case-by-case basis, appear clearly to extend jurisdiction of your agencies far more broadly. As I read the proposed rules, CWA jurisdiction would extend upgradient from traditional navigable waters into the lands of our State, no matter how remote from traditional navigable waters, which host occurrences of water that, due to gravity, could conceivably end up in a traditional navigable water.

Your own proposal seems to acknowledge the extension when, again at page 22192, you state that "Because Justice Kennedy identified 'significant nexus' as the touchstone for CWA jurisdiction, the agencies determined that it is reasonable and appropriate to apply the 'significant nexus' standard for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands to other categories of water bodies as well . . . to determine whether they are subject to CWA jurisdiction."

I cannot agree it is appropriate to apply the "significant nexus" standard to other categories of water bodies. As the majority of the Supreme Court said in the *SWANCC* case: "We said in *Riverside Bayview* that the word 'navigable' in the statute was of 'limited import,' 474 U.S. at 133. . . . But it is one thing to give a word limited effect and quite another to give it no effect whatever." This statement was confirmed by Justice Kennedy in his concurring opinion in the

Rapanos case: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters' that are not in fact navigable . . . . Nevertheless, the word 'navigable' in the Act must be given some effect. *See SWANCC*, *supra*, at 172." 547 U.S. 779. I believe that your proposed regulations would completely untether the scope of your agencies' jurisdiction from the statutory requirement of navigability, and I think this is proven by comparing your proposal to what Justice Kennedy would allow:

> Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

547 U.S. 715, 780, 781.

While this discussion was about tributaries and adjacent wetlands, it indicates a regulation must contain specific criteria that allow objective identification of jurisdictional waters. But in your agencies' proposal, the definitions of "neighboring," "riparian area," "floodplain," and "significant nexus," lack any such specific limiting or defining criteria as to volume of flow, proximity to navigable waters, or any other parameter. The only definition containing such criteria is the definition of "tributary," in its reference to bed, banks and ordinary high water mark, but after naming those, the definition quickly departs from any objectively identifiable criteria when it says: "In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this definition."

The overreach of your proposal is objectionable not for the protections your agencies seek to extend. Montanans long ago decided our waters are worth protecting and acted accordingly. The problem is that your overreach impinges directly on our state sovereignty. It offends Congress's stated intention in the Clean Water Act to recognize, protect and preserve the primary rights of the States to manage their lands and water resources. It violates, in my opinion, the admonitions of the U.S. Supreme Court that the Act's jurisdiction is and must be limited to waters that have a significant nexus to core waters. In short, the proposal seeks to extend the reach of the Act beyond what is allowed by the Commerce Clause.

As an example of the practical problems caused by the proposal's unwarranted impingement on our sovereignty, our Water Quality Act defines state waters in terms of "a body of water." Mont. Code Ann. § 75-5-103(34(a). Your agencies' proposal, on the other hand, extends the requirements and procedures of the CWA, and your agencies' jurisdiction, to waters "located within" such broad areas as areas "bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal structure in that area . . ." and areas "bordering inland . . . waters that was formed by sediment deposition from such

water . . . ." Our State, acting pursuant to the authorities I described earlier in this letter, may choose to protect water quality in such broad areas as these in a different fashion than would be imposed on us by the "one size fits all" requirements of the CWA as implemented by your agencies. Hence, under your proposal, we lose the ability to fashion our own remedies on lands and waters that are truly remote from traditional navigable waters, a result that violates Congress' expressed intent in enacting the CWA as well as the pronouncements of the U.S. Supreme Court.

You are aware that the Congress declined, in 2007, to enact proposed legislation which would have expressed the intention to extend the reach of the Clean Water Act to all waters in the nation "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." The fact Congress was unwilling to adopt this expression of intent indicates clearly the Clean Water Act is limited in its jurisdictional reach and that your agencies' proposal is beyond what is authorized by that Act.

Montana is submitting additional comments through Director John Tubbs of the Montana Department of Natural Resources and Conservation focusing on practical and technical issues with proposed rules. We support those comments, ask that you consider them carefully, and that you have your agency personnel meet with our State's agency personnel as necessary to fully understand the measures and procedures our State has implemented to protect our water resources.

Following your review and assessment of comments received, I urge you to withdraw the current proposal and replace it with a proposal that defines "waters of the U.S." in a manner that better reflects the limits of the Commerce Clause, Congress' clearly stated intent, and the guidance of the U.S. Supreme Court.

I appreciate the opportunity to comment and look forward to hearing from you.

Sincerely,

TIM FOX
Attorney General