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April 15, 2019

Via www.regulations.gov
The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
Office of the Administrator
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army
Office of the Assistant Secretary of the
Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: Revised Definition of Waters of the United States
Docket No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Assistant Secretary James:

On behalf of the Missouri State Conference of the National Association for the Advancement of Colored People ("Missouri NAACP"), Great Rivers Environmental Law Center ("Great Rivers") submits the following comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) proposed Revised Definition of "Waters of the United States." The proposed rule essentially adopts a standard suggested by Justice Scalia

in *Rapanos v. United States*, 547 U.S. 715 (2006). We respectfully request that EPA and the Corps withdraw the proposed rule.

Founded in 1909, the NAACP is the nation's foremost, largest, and most widely recognized civil rights organization. Its more than half-million members and supporters are the premier advocates for civil rights in their communities. Environmental justice is one of the NAACP's current, core issues. Environmental injustice has a disproportionate impact on communities of color and low income communities in Missouri and throughout the United States. These comments focus upon the environmental justice impacts of the proposed rule.

The Missouri NAACP and Great Rivers generally support the comments which have been submitted by a great many of the Nation's conservation and environmental organizations. The proposed rule is a bad rule for water quality, habitat loss, and flood impacts. Our comments below, though, focus upon the harmful impacts which will arise from the loss of wetlands and the resulting loss in floodwater storage. These harmful impacts likely will have a substantial and disproportionate impact on the communities the Missouri NAACP serves.

Although Missouri has lost more than eighty-seven percent of its wetlands, there still exist large areas of wetlands which serve as storage for our Region's floodwaters. Substantial wetlands still exist along the Mississippi and Missouri Rivers. Close to St. Louis, a great many acres of wetlands are along the confluence of the Mississippi and Missouri Rivers, just to the north. Further away, to the south, tens of thousands of acres of wetlands play an essential role in storing floodwater near the confluence of the Mississippi and Ohio rivers. For more than forty years, EPA and the Corps have protected wetlands such as these.

With regard to federal protections which, over the years, our nation's courts have upheld, by 1977, both EPA and the Corps had defined "Waters of the United States" in their respective Clean Water Act regulations to include wetlands which if used, degraded, or destroyed "would or could" affect interstate commerce. 40 C.F.R. § 122.2 (EPA); 40 C.F.R. § 230.3(s) (EPA); 33 C.F.R. § 328.3(a)(Corps). Further, by 1990, consistent with the intent of Congress, almost all of the federal appellate courts had concluded that federal Clean Water Act jurisdiction over navigable waters extended to the limits of the commerce clause. E.g., *United States v. Ashland Oil & Transp. Co*., 504 F.2d 1317, 1324 (6th Cir. 1974), quoting from the 1972 Conference Bill ("'The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.' 118 Cong. Rec. 33756-57 (1972)").

Roughly thirty years later, after the Supreme Court handed down *Rapanos v. United States*, 547 U.S. 715 (2006) (interpreting the scope of "waters of the United States" (and publishing five different opinions)), the federal Courts of Appeals were called upon to determine the appropriate test regarding federal Clean Water Act jurisdiction. Almost all have done so. To date, *no* U.S. Court of Appeals has adopted Justice Scalia's proposed standard as a sole basis for determining Clean Water Act jurisdiction. Instead, *all* of the Courts of Appeals have adopted *either* Justice Kennedy's "significant nexus" standard or a standard that meets *either* Justice Scalia's suggested standard *or* the Justice Kennedy standard. The proposed rule is contrary to

the standard EPA and the Corps have been following for more than forty years, and contrary to the standard the federal appellate courts have been following for the past ten years.

Only last week EPA Administrator Wheeler reportedly said, "I think what is effective regulation is one that follows the law and one that will be held up in court." The definition which EPA and the Corps now propose to change has withstood judicial scrutiny for more than four decades. It follows the law, so says our judiciary, liberal and conservative. EPA and the Corps should leave it alone.

The proposed new definition may too hold up in court. However, the new definition would roll back protections which have been in place since President Carter held office. Unless EPA and the Army Corps change course, this particular proposal will remove protections for at least half the remaining wetlands in the United States. Over the years nothing about the vast majority of these wetlands has changed. These wetlands still have the capacity to store water and protect people from floods. They still filter pollutants from our nation's waters. They still provide habitat for waterfowl. One need only look to one of USEPA's websites to learn that,

> "Wetlands function like natural tubs or sponges, storing water and slowly releasing it. This process slows the water's momentum and erosive potential, reduces flood heights . . . [and] a network of many small wetlands can store an enormous amount of water. The ability of wetlands to store floodwaters reduces the risk of costly property damage and loss of life—benefits that have economic value to us."

If the current definition of "Waters of the United States" stays, most of the nation's remaining wetlands will stay. Under the revised rule, more than half may be destroyed.

Unless EPA and the Army Corps change course, our Region's water fowlers will bear some of the brunt of the new rule. A great many of these wetlands are within the Mississippi River flyway – the most heavily used migration corridor for waterfowl and other birds. The greater burden, however, will be borne by people who make their homes in low-lying areas. These people typically are not prosperous, and they often are not white.

Sincerely,

/s/ Bruce A. Morrison

Bruce A. Morrison