Florida Department of Environmental Protection

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Rick Scott
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Secretary

June 19, 2017

Mr. Scott Pruitt
Administrator
Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Douglas W. Lamont, P.E.
Senior Official Performing the Duties
of the Assistant Secretary of the Army
108 Army Pentagon
Washington, DC 20310-0108

Dear Administrator Pruitt and Mr. Lamont:

Thank you for the opportunity to provide input on EPA's forthcoming proposal to revise the definition of "waters of the United States."[1] As you are aware, the regulation of land and water is a traditional and primary power of the states and, to Florida, one of utmost importance. Florida has one of the most comprehensive and well-funded water resources programs in the country and is dedicated to keeping Florida's waters free from pollution and providing regulatory certainty to Florida's citizens and industries.

The Department has integrated surface water and ground water protection in its watershed management program that covers more than 2,000 linear miles of coastline; nearly 1.6 million acres of lakes; more than 27,000 miles in length of rivers and streams, with another 48,000 miles of canals and ditches; 33 first-magnitude springs each discharging at least 65 million gallons per day and more than 1,000 springs in total; and 1.7 million acres of estuaries. Florida's surface waters cover almost 17,900 square miles and include the third largest area of inland waters among the 50 states. The Department has, along with the state's water management districts and other local partners, collected millions of data points (Florida provides over one third of the nutrient data in EPA's water quality database, WQX)

[1] Letter from Scott Pruitt, Administrator of the Environmental Protection Agency and Douglas W. Lamont, P.E., Senior Official Performing Duties of the Assistant Secretary of the Army to Governor Rick Scott (May 7, 2017).

to assess the health of water resources and established scientific water quality restoration targets and plans for individual water bodies when they do not meet standards. To address impaired water bodies, Florida works collaboratively with various stakeholders, in a continuous cycle to promote an increasingly refined understanding of water quality and assure that restoration actions, and water quality protection programs, are routinely re-evaluated and improved.

The Department's authority to regulate Florida's water resources is far broader than the authority of the federal agencies regulating "waters of the United States." The definition of "waters" in Florida law is likewise much broader than the Clean Water Act's definition of "waters of the United States" and includes wetlands and underground waters. *See* § 403.031(13), Fla. Stat. Through its Environmental Resource Permitting Program, the Department has independent state authority to require permitting and mitigation for any work in, on, or over surface waters or wetlands, including isolated wetlands, which is more comprehensive than the federal dredge and fill program under Section 404 of the Clean Water Act. *See* §373.414, Fla. Stat. Additionally, the Department's broad authority to regulate the addition of pollutants to both surface and ground waters ensures that all waters in Florida are protected. *See* §§ 403.031(13), 403.087 and 403.088, Fla. Stat.

The state's water resources are an intrinsic part of Florida's way of life and economy. Florida's comprehensive water program is committed to ensuring the protection of water quality across the state and looks forward to working with you to define "waters of the United States." Please find the attached memo from the Department's Office of General Counsel outlining the legal considerations for defining "waters of the United States."

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Noah Valenstein
Secretary

Attachment

Review of Waters of the United States Rulemaking

Overview

In 2015, the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) issued a final rule defining "waters of the United States." *See* 80 Fed. Reg. 37,054 (June 29, 2015). On February 28, 2017, President Trump issued Executive Order No. 13778, directing the Administrator of the EPA and the Assistant Secretary of the Army for Civil Works to review the final rule and to publish "a proposed rule rescinding or revising the rule, as appropriate and consistent with law." *See* Executive Order No. 13778, 82 Fed. Reg. 12497 (March 3, 2017). The order also directs EPA and the Corps "to consider interpreting the term 'navigable waters'... in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)." *Id.* On March 6, 2017, the EPA and Corps published their "Intention to Review and Rescind or Revise the Clean Water Rule," announcing consideration of "interpreting the term 'navigable waters,' as defined in the CWA in a manner consistent with the Opinion of Justice Scalia in *Rapanos*, and their intention to "provide greater clarity and regulatory certainty concerning the definition of 'waters of the United States.'" 82 Fed. Reg. 12532 (March 6, 2017).

In *Rapanos*, the Court vacated a lower court's ruling that EPA correctly determined four wetlands were subject to federal regulatory jurisdiction as "waters of the United States" under the Clean Water Act. *Rapanos v. United States*, 547 U.S. 715, 729-30 (2006). In reaching its decision, the Court issued five separate opinions, including a four-Justice plurality by Justice Scalia, a concurrence by Justice Kennedy, and a four-Justice dissent by Justice Stevens. *Id* at 718, 757, 759, 787 and 811. In the plurality opinion, Justice Scalia explained that the agencies' expansive interpretation of "waters of the United States" is not "based on a permissible construction of the statute" and "stretches the outer limits of Congress's commerce power." *Id* at 738, 739. Instead, relying upon the dictionary meaning and plain language the plurality opinion found that "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'" but specifically excludes "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id* at 739; *citing* Webster's New International Dictionary 2882 (2d ed. 1954). In the concurrence, Justice Kennedy suggests a broader interpretation of "waters of the United States" that includes those waters or wetlands that have a "significant nexus" to waters that are navigable in fact. *Id* at 780 (finding that wetlands come within the "phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'").

In promulgating its 2015 definition of "Waters of the United States," EPA sought to adopt the approach suggested in Justice Kennedy's concurring opinion. *See* 79 Fed. Reg. 22,192, 209, and 252-262 (April 21, 2014). Regardless of whether the definition actually adopts this approach, the more legally defensible approach is to avoid any departure from the plain language of the statute as explained by Justice Scalia in the Court's plurality opinion. Adherence to the plain

language is consistent with the Constitution's requirement for regulatory agencies to create regulatory certainty and respect the sovereign powers of the states.

Regulatory Certainty

Developing clear and understandable rules is more than just a goal for regulatory agencies, it is a constitutional requirement. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) ("A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague." *Id.* (*citing United States v. Williams*, 553 U.S. 285, 304 (2008)).

Adhering to the plain language of the Clean Water Act as the basis of a new rule to define "waters of the United States," as specified in the *Rapanos* plurality opinion, will provide much needed certainty in an area that could use greater certainty. EPA's 2015 approach does not provide such clarity. Instead, it embodies inherent ambiguity by creating a case-by-case "significant nexus" test.

Independent State Authority to Regulate Water Resources

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const., amend. X. The Tenth Amendment is implicated when a federal rule addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair a State's ability to structure integral operations in areas of traditional state functions. *See Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-87 (1981). Land and water use is traditional and primary state power. *See Rapanos*, 547 U.S. 715, 738 (2006). Developing a rule based on the plain language of the Clean Water Act will ensure that States' sovereign authority over land and waters will not be impaired.

As pointed out in the Department's November 14, 2014 comment letter related to this rulemaking, the Department's authority to regulate water resources is far broader than its approvals from EPA to implement federal programs in "waters of the United States." Under Florida's Environmental Control Law, Chapter 403, *Florida Statutes*, regulated "waters" or waters of the state" is defined broadly to generally include rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters. *See* §403.031(13), Fla. Stat. For the purpose of implementing the federal National Pollutant Discharge Elimination System program in Florida, "waters of the United States" automatically are considered "waters of the state" in addition to the other waters covered. *Id.* Thus, in Florida, "waters of the United States" are a subset of the term "waters of the state." *Id.*

Florida law also provides the Department with broad authority to regulate and permit the addition of pollutants to waters of the state. *See* §§ 403.086, 403.087, 403.088 403.0885, Fla Stat. Because of this broad authority, the Department has regulatory authority to implement the National Pollutant Discharge Elimination System program in Florida, but to also go beyond that program and regulate discharges of pollutants to groundwaters as well. *Id.*

Florida's Water Resources Law, Chapter 373, *Florida Statutes*, similarly encompasses waters beyond those subject to federal jurisdiction. Under Chapter 373, "waters in the state" is defined to include any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial water courses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state. *See* § 373.019(22), Fla. Stat. The independent state authority found in Chapter 373 authorizes the Department to implement its Environmental Resource Permit and Joint Coastal Permit programs. *See* §§ 373.413, 373.414 and 161.055 Fla. Stat. These programs require permitting and mitigation for any work or project in, on, or over surface waters or wetlands, including isolated wetlands. *Id.* The state's Environmental Resource Permitting program is more comprehensive than the federal dredge and fill program under section 404 of the Clean Water Act because it also regulates alterations of uplands that may affect surface water flows, and addresses issues of the flooding and stormwater treatment. *Id.* In addition, these state programs include permitting requirements that are not found in its federal counterpart, such as a requirement that the project be in the public interest. *Id.* Perhaps most important, there is no requirement that water bodies be connected to or impact a navigable water for the state program to apply. *Id.*

Conclusion

Interpreting the term "navigable waters" consistent with the opinion of Justice Scalia in *Rapanos* – an opinion that adheres to the plain language the Clean Water Act - ensures that the Nation's waters are protected and that regulatory certainty is provided to those impacted, while at the same time affording the appropriate consideration to the sovereign powers of the States. In that regard, as discussed herein, Florida's regulations demonstrate its commitment to protecting its waters and natural resources.