COALITION OF LOCAL GOVERNMENTS
925 SAGE AVENUE, SUITE 302
KEMMERER, WY 83101

COUNTY COMMISSIONS AND CONSERVATION DISTRICTS FOR LINCOLN,
SWEETWATER, UINTA, AND SUBLETTE - WYOMING

June 19, 2017

VIA E-MAIL: CWAwotus@epa.gov
Docket ID No.: EPA-HQ-OW-2011-0880
Donna Downing
Office of Water
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Comments on the Notice of Intent to Review and Rescind or Revise the Clean Water Act Rule and the Notice of Coordination with State and Local Governments

Dear Ms. Downing,

The Coalition of Local Governments (Coalition), on behalf of its members, submits the following comments on President Trump's February 28, 2017 Executive Order, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (WOTUS Rule), the Notice of Intent to Review and Rescind or Revise the WOTUS Rule (82 Fed. Reg. 12532 (Mar. 6, 2017)), and the notice of coordination with state and local governments pertaining to the review of the WOTUS Rule. On November 14, 2014, the Coalition provided extensive comments on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) Proposed WOTUS Rule, 79 Fed. Reg. 22188, and incorporates those comments by reference. *See* Attached Comments. The Coalition supports the Administrations re-evaluation of the 2015 WOTUS Rule and appreciates the early coordination and consultation with local governments. The review of the WOTUS Rule also reflects the decision of the Sixth Circuit Court of Appeals that enjoined the regulations.

I. Statement of Interest

The Coalition is a voluntary association of local governments organized under the laws of the State of Wyoming to educate, guide, and develop public land policy in the affected counties. Wyo. Stat. §§11-16-103, 11-16-122, 16-1-101, 18-5-201, 18-5-208. Coalition members include Lincoln, Sublette, Sweetwater, and Uinta Counties, as well as Lincoln Conservation District, Sweetwater County Conservation District, Sublette County

Conservation District, Uinta County Conservation District, and Little Snake River Conservation District. The Coalition's purpose is to protect the vested rights of individuals and industries dependent on the resources on public lands, establish an equitable balance between wildlife, livestock and wild horses, promote and support the appropriate use of public lands, promote and support habitat improvements for wildlife and plant species, and use collaboration and the comment process for federal land use plans and related land use projects to educate the federal officials regarding the relationship between natural resources and the communities.

The Counties are local government agencies established under Wyoming law with broad powers to provide for the development and zoning of all lands within its boundaries to promote the public health, safety and general welfare of the county. Wyo. Stat. §§18-5-201, 18-5-208 (special expertise of the board of county commissioners includes anything related to the health, safety, welfare, custom, culture and socio-economic viability of a county). Counties also have the power to establish a surface water drainage utility to design, plan, construct, operate, improve, or maintain a surface water drainage system. Wyo. Stat. §§16-10-103, 16-10-104.

The Wyoming Conservation District law confers on the districts broad authority to conserve and manage soil, water, and vegetation. Wyo. Stat. §§11-16-101 et al. The conservation districts were established to provide for the conservation of the soil, water and vegetation, prevent soil erosion and flooding, stabilize ranching and farming operations, preserve natural resources and wildlife, and protect the health, safety and general welfare of the people. Wyo. Stat. §11-16-103. These legislative policies are achieved through surveys and research, demonstration projects, implementation of control and preventive measures to protect resources, cooperative agreements, and engagement in comprehensive land use planning. Wyo. Stat. §11-16-122. The conservation districts have special expertise involving the stabilization of the agricultural industry, conservation of soil and water resources, flood prevention, and the conservation, development, utilization and disposal of water within their district. Wyo. Stat. §11-16-135. Conservation district beneficiaries own and develop water, both surface and ground water.

II. Supreme Court Decisions Limiting the Scope of Regulation Under the Clean Water Act

The Clean Water Act (CWA), 33 U.S.C. §§1251-1387, is grounded on Congress's authority to protect the flow of interstate commerce, found in the Commerce Clause of the U.S. Constitution. The EPA and Corps jurisdiction over waters under the CWA is limited to "navigable waters," which is defined as "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7).

Three U.S. Supreme Court decisions have defined and limited the scope of the EPA and Corps jurisdiction over waters under the CWA: *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). These three cases create the backdrop against which the EPA and Corps WOTUS Rule defines the scope of waters protected under the CWA.

In *Riverside Bayview Homes, Inc.*, the Supreme Court held that the definition of "waters of the United States" included wetlands adjacent to other bodies of water that the Corps had jurisdiction over pursuant to the CWA. 474 U.S. at 133-35. The Supreme Court in *SWANCC* later clarified that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S. at 167. The Court then held that "waters of the United States" did not extend to isolated waters that have no connection to navigable waterways. *Id.* at 168, 174.

Finally, in *Rapanos*, Justice Scalia's plurality opinion held that the phrase "waters of the United States" unambiguously excludes intermittent and ephemeral channels, as well as wetlands with only "intermittent, physically remote hydrologic connection" to traditional navigable waters. 547 U.S. at 733-35, 739, 742. The definition is specifically limited to "relatively permanent, standing or continuously flowing bodies of water" and adjacent wetlands with a "continuous surface connection" to such bodies of water. *Id.* at 739, 742. This definition does not exclude streams, rivers, or lakes that may dry up in extraordinary circumstances, such as drought, or seasonal rivers. *Id.* at 732 n.5.

Justice Kennedy filed a separate concurrence in which he advocated a case-by-case analysis of whether a "significant nexus" exists between wetlands and navigable waters such that the wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 779-80. However, Justice Kennedy also rejected the notion that the mere presence of a hydrologic connection was sufficient to establish the required nexus with navigable waters to qualify a wetland as a "water of the United States." *Id.* at 784-85.

These three cases create a single rule: the EPA and Corps have jurisdiction over those wetlands that are continuously adjacent to or have a significant nexus with traditional navigable waters under the CWA. *Riverside Bayview Homes, Inc.*, 474 U.S. at 133-35; *Rapanos*, 547 U.S. at 739, 742, 779-80.

III. National Injunction Documents Failings of WOTUS Rule

The WOTUS Rule was challenged by numerous states, local governments, and private industries on the basis that the definitional changes effect an expansion of the EPA and

Corps' regulatory jurisdiction and alter the existing balance of federal-state collaboration in regulating the nation's waters. *In re U.S. Dep't of Defense & U.S. Envtl. Prot. Agency Final Rule: Clean Water Rule*, 817 F.3d 261, 264 (6th Cir. 2016), *cert. granted*, *Nat'l Ass'n of Mfrs. v. Dep't of Defense, et al.*, 137 S.Ct. 811 (Jan. 13, 2017). The petitioners also argue that the "significant nexus" test used to determine which tributaries and waters adjacent to navigable waters are protected under the CWA is not consistent with the law as defined by the Supreme Court and was adopted in violation of the Administrative Procedure Act's rulemaking requirements. *Id.* These consolidated cases are currently before the U.S. Supreme Court on the issue of which federal court has jurisdiction to hear the cases.

On October 9, 2015, however, the Sixth Circuit Court of Appeals issued a nationwide stay of the WOTUS Rule pending further proceedings in the action. *In re Envtl. Prot. Agency and Dep't of Defense Final Rule*, 803 F.3d 804, 806-809 (6th Cir. 2015). The Court found that "petitioners have demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807. The Court stated it was "far from clear that the new Rule's distance limitations [for "adjacent waters" and "significant nexus"] are harmonious with the instruction" of Justice Kennedy's opinion in *Rapanos*. *Id.* The government also failed to identify that the "public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered" and failed to identify "specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose." *Id.* "A stay allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law. *Id.* at 808.

This nationwide stay raises significant questions as to the legality of the WOTUS Rule and further documents the inherent failings of the EPA and Corps' attempt to define "waters of the United States" under the CWA.

IV. The WOTUS Rule Extends Authority Absent Legislation

The stated intent and scope of the WOTUS Rule was to define "waters of the United States" consistent with the CWA, Supreme Court precedent, and science, and provide greater clarity regarding those water that are subject to CWA jurisdiction. 80 Fed. Reg. 37054, 37055, 37057-37058 (June 29, 2015). The EPA and Corps ultimately exceeded the authority granted under the CWA and Supreme Court precedent, and unlawfully gives the EPA and Corps the discretion to assert CWA jurisdiction over virtually all waters in the Country.

The agencies do not have the legislative authority to extend their authority past what was granted in the CWA by amending their regulations. The EPA and Corps are held to the

laws as written and cannot rewrite the law. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768-69 (2014) (Holding that HHS could not change the definition of a person by rulemaking. The Court emphasized that giving a word a different meaning for each section of a statute is the same as inventing the law, not interpreting it.).

Since the CWA was enacted in 1972, the term "navigable waters" has been defined as "waters of the United States, including the territorial seas." Pub. L. No.92-500, §502(7), 86 Stat. 816, 886 (1972) (codified as amended at 33 U.S.C. §1362(7) (2008)). The Corps originally interpreted "navigable waters" to mean "those water of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." *SWANCC*, 531 U.S. at 168 (*quoting* 33 C.F.R. §209.120(d)(1) (1975)). Over the next 40 years, EPA and the Corps expanded the definition to include interstate waters, tributaries of waters of the United States, and all wetlands even if isolated. *See* 33 C.F.R. §328.3(a); 40 C.F.R. §230.3(s).

As was discussed above, the Supreme Court has found that the EPA and Corps have jurisdiction over only those wetlands that are continuously adjacent to or have a significant nexus with traditional navigable waters under the CWA. *Riverside Bayview Homes, Inc.*, 474 U.S. at 133-35; *Rapanos*, 547 U.S. at 739, 742, 779-80. Therefore, the EPA and Corps' current attempt to increase their jurisdiction over "waters of the United States" exceeds the authority granted to it by the CWA and current Supreme Court precedent. Such attempt to change the law through its regulations is invalid absent the legislative authority to do so.

V. Specific Suggestions for the Review and Re-assessment of the WOTUS Rule

The Coalition provides the following comments for consideration during the review of the WOTUS Rule:

1. The term "navigable" within the CWA must be given some meaning and the jurisdiction over waters must therefore depend on the existence of a significant nexus to waters that are navigable in fact or that are adjacent and connected to traditional navigable waterways. *Riverside Bayview Homes, Inc.,* 747 U.S. at 135; *Rapanos*, 547 U.S. at 779.

2. A jurisdictional water "includes only those relatively <u>permanent, standing or continuously flowing bodies of water</u> 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes." *Rapanos*, 547 U.S. at 739 (emphasis added). It does not include channels where water flows intermittently or ephemerally, or channels where rainfall

periodically drains. *Id.* The WOTUS Rule included tributaries as "waters of the United States" when they have "bed and banks and an indicator of ordinary high water marks" that contribute to the flow of a traditional navigable water, interstate water, or territorial seas. 80 Fed. Reg. at 37058, 37068, 37076. This definition conflicts with the plurality opinion in *Rapanos* and expands the EPA and Corps' authority to waters that are only intermittent or ephemeral, and would include a number of man-made ditches and canals under CWA jurisdiction. *See* 80 Fed. Reg. at 37068 ("The great majority of covered tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream waters."), 37076 ("Under this rule, flow in the tributary may be perennial, intermittent, or ephemeral."), 37078 ("Ditches are one important example of constructed features that in many instances can meet the definition of tributary."). In Wyoming, depressions will hold water seasonally but otherwise are dry and do not have the requisite interstate connection but may fall within "waters of the United States" under the WOTUS Rule.

3. Adjacent waters, such as wetlands, shall be included under CWA jurisdiction only if they have a clear, surface nexus with a navigable water. *See Rapanos*, 547 U.S. at 742, 784-85 (Holding that only wetlands with a continuous surface connection to "waters of the United States" are considered adjacent to such waters.). The EPA and Corps cannot expand the definition of "adjacent" to include those areas located within the 100-year floodplain or 100-feet to 1,500-feet of a tributary's ordinary high water mark. *See* 80 Fed. Reg. at 37058, 37069-37070, 37080-37081, 37085.

4. The CWA does not provide the EPA or Corps with regulatory jurisdiction over groundwater, even if it is hydrologically connected to surface waters. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("The law in this Circuit is clear that ground waters are not protected waters under the CWA."); *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the [CWA] nor the EPA's definition asserts authority over ground waters, just because they may be hydrologically connected with surface waters."). Therefore, the EPA and Corps cannot regulate tributaries that have a man-made or natural break where the stream segment flows underground, or an adjacent water that is only hydrologically connected to traditional navigable waters. *See* 80 Fed. Reg. at 37078 (underground breaks in tributaries), 37083 (shallow subsurface flow "may be important factor in evaluating a water on a case-specific basis"), 37089-37090.

5. The EPA and Corps' definition of "significant nexus" must conform to the standards as set forth by Supreme Court precedent. A water will fall within the jurisdiction of the CWA if the water or wetland, "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.'" *Rapanos*, 547 U.S. at 780 (emphasis added); *see SWANCC*, 531 U.S. at 167. The similarly situated waters in a region cannot be interpreted so broadly to include all streams, wetlands, lakes, and open waters within a watershed that drains at a single point into a traditional navigable water, interstate water, or territorial sea. *See* 80 Fed. Reg. at 37066-37067, 37091-37092. This broad definition disregards the original intent and purpose of the CWA to protect those navigable waters, which are subject to the ebb and flow of the tide, and that are or may be involved in interstate commerce. H.R. Rep. No. 95-830 (1997), *reprinted in* 1977 U.S.C.C.A.N 4424, 4472; *SWANCC*, 531 U.S. at 168 (*quoting* 33 C.F.R. §209.120(d)(1) (1975)).

Thank you for the opportunity to comment.

Sincerely,
/s/ Kent Connelly
Kent Connelly, Chairman
Coalition of Local Governments

cc: Wyoming Governor's Office
Honorable Mike Enzi
Honorable John Barrasso
Honorable Liz Cheney
Wyoming Department of Environmental Quality
Wyoming Department of Agriculture
Wyoming Game and Fish
Wyoming Association of Conservation Districts
Wyoming County Commissioners Association
Wyoming State Engineer
Wyoming State Lands