

**U.S. House of Representatives
Committee on Transportation and Infrastructure**

U.S. Senate Committee on Environment and Public Works

Joint Hearing on “Impacts of the Proposed Waters of the United States Rule on State and Local Governments”

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**Testimony of Lemuel M. Srolovic
Bureau Chief, Environmental Protection Bureau
Office of New York State Attorney General Eric T. Schneiderman**

The Office of New York State Attorney General Eric T. Schneiderman appreciates this opportunity to submit testimony supporting the “waters of the United States” rule proposed by the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers.¹ As set forth more fully below, this administrative action is critically important. The rulemaking seeks to provide much-needed clarification to the question whether the federal Clean Water Act applies to a particular water body. The answer to that question is vital because – while the Act does not apply to every water within the United States – the statute’s comprehensive application to the nation’s waters is essential for continuing progress towards meeting the Congressional goal embodied in the statute – “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”² Presently, jurisdictional decisions related to “waters of the United States” are made on a case-by-case basis, subject to fractured and inconsistent legal interpretation by the courts, fostering uncertainty, delay and further litigation. This rulemaking seeks to clarify the applicability of the Clean Water Act, thereby accelerating jurisdiction decisions and making them more predictable and less costly. This clarity will not only better serve to restore and protect our waters, but also better serve the interests of states in implementing federal and their own state water pollution control programs, and public and private entities involved in activities subject to the Act.

¹ 79 Fed. Reg. 22188 (April 21, 2014).

² 86 Stat. 816, § 101(a), 33 U.S.C. § 1251(a).

Background

In the early 1970s, the United States faced a water pollution crises. In 1969, petroleum and chemical-soaked debris ignited, and the Cuyahoga River in Cleveland, Ohio burst into flames.³ That same year, surveys found that over 41 million fish were killed from pollution, including some 26 million that were killed in Lake Thonotosassa in Florida from food processing plant discharges.⁴

In New York, bacteria levels in the Hudson River were recorded at levels 170 times the safe limit.⁵ The Bronx River – New York City’s only freshwater river – once the home of beaver and other wildlife, had degenerated into what one official called an “open sewer.” Central New York’s Onondaga Lake literally stank in the summer and was frequently referred to as “The Most Polluted Lake in the Country.” Motorists driving by the lake would roll up their windows.

Responding to this crisis, Congress in 1972 fundamentally re-wrote the federal water pollution control law by enacting the Clean Water Act. The old law had addressed water pollution by authorizing federal cures for water pollution problems on an ad hoc water-by-water, polluter-by-polluter basis. But that narrow approach had failed to protect the nation’s waters. In 1972, Congress determined that America’s waters were “severely polluted,” “in serious trouble,” and that the “federal water pollution control program . . . has been inadequate in every vital respect.”⁶

With the Clean Water Act, Congress replaced that failed scheme with a comprehensive approach to pollution control that, depending on the type of discharge, prohibits the release of any pollutant into the nation’s waters from a point source absent either: 1) a state or federal National Pollutant Discharge Elimination System; or 2) a dredge and fill discharge permit. And the waters protected by the act are broad, covering “virtually all surface water in the country.”⁷

In the four decades since its enactment, the States, the EPA and the Army Corps have implemented the pollution discharge prohibition and the other provisions and programs of the Clean Water Act, achieving remarkable progress in improving water quality in the United States. In the mid-1980s, biologists counting fish in the lower section of the Cuyahoga River would tally fewer than 10 individual

³ http://blog.cleveland.com/metro/2009/01/after_the_flames_the_story_beh.html

⁴ R. Adler, J. Landman & D. Cameron, *The Clean Water Act 20 Years Later* (1993) at 5.

⁵ *Id.*

⁶ *Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981).

⁷ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

fish. In 2008, biologists found 40 different fish species in the river, including steelhead trout, northern pike and other fish that require clean water.⁸ Lake Thonotosassa is now a popular fishing destination. And in New York, a beaver returned to the Bronx River in 2006. Onondaga Lake is continuing its recovery. The lake that decades ago supported only six species of pollution-tolerant fish in 1970, now supports over 60 species of fish. In fact, a few years ago the North American Fishing Club named Onondaga Lake one of America's top ten bass fishing destinations. Integrating the maxim that an "ounce of prevention is worth a pound of cure" with sound watershed science, the Clean Water Act has been highly successful in its mission of restoring and protecting the Nation's waters.

The "waters of the United States" rulemaking brings together sound science and extensive experience in implementing the Act to move beyond case by case jurisdiction decisions and to define as much as possible the categories of waters that comprise the waters of the United States, while retaining flexibility to apply the rule consistent with regional differences in this large and hydrologically diverse nation.

Agency Rulemaking is Needed to Clarify the Statutory Term "Waters of the United States"

Since the Supreme Court's plurality decision in *Rapanos v. United States*, 547 U.S. 715 (2006), a complex and confusing split has developed among the federal courts regarding which waters are "waters of the United States" and therefore within the Act's jurisdiction. The federal circuits have embraced at least three distinct approaches in instances of uncertain Clean Water Act jurisdiction, with some courts adopting Justice Kennedy's significant nexus test, some adopting the plurality's test, and some tending to defer to the agencies' fact-based determinations. Many courts have actively avoided ruling on the controlling law, highlighting the need for agency clarification. The confusion and disagreement in the courts have produced inconsistent outcomes and contribute to the ongoing uncertainty regarding the Act's application. Providing clear categories of waters subject to the Act through the agencies' rulemaking would alleviate much of the jurisdictional uncertainty and allow for more efficient administration of the Act. The rule's clarity would greatly benefit States by easing the considerable administrative burden of having to make many fact-based determinations employing uncertain tests.

⁸ http://blog.cleveland.com/metro/2009/01/after_the_flames_the_story_beh.html

The Supreme Court’s decision in *Rapanos* presented the lower courts with the complex problem of how to apply a plurality decision where the concurring opinion is not a logical subset of the plurality opinion. See *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006) (discussing the complexity of applying a plurality decision when none of the opinions’ reasoning commands a majority of the Justices). What has emerged is a confusing circuit split with courts adopting at least three or four different approaches to the jurisdictional question posed by *Rapanos*-like cases – with no single approach controlling in a majority of the federal courts.

Some of the cases addressing “waters of the United States” following *Rapanos* have been decided under the test from *Marks v. United States*, which directs courts to adopt as binding “that position taken by those Members [of the court] who concurred in the judgments on the narrowest grounds.” 430 U.S. 188, 193 (1977); *United States v. Robinson*, 505 F. 3d 1208, 1221–22 (11th Cir. 2007); *United States v. Gerke Excavating Inc.*, 464 F.3d 723 (7th Cir. 2006). Other cases have been decided using Justice Stevens’ instruction from his *Rapanos* dissent, which directs lower courts to recognize federal regulatory jurisdiction any time either the plurality’s test or Justice Kennedy’s test would find jurisdiction proper. See *Rapanos*, 547 U.S. at 810; *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). Still other cases upheld regulatory jurisdiction only when the agency asserting jurisdiction provided fact-based evidence of a reasonable ground for doing so in accordance with the EPA and Army Corps’ *Rapanos* Guidance document. See *Deerfield Plantation Phase II-B Prop. Owners Ass’n v. United States Army Corps of Eng’rs*, 501 F. App’x 268, 275 (4th Cir. 2012).

Not surprisingly, court decisions addressing the jurisdictional question posed by *Rapanos* have produced highly inconsistent outcomes. The Ninth Circuit, which has decided approximately one-third of all post-*Rapanos* jurisdictional cases, has not adopted a unified standard. Compare *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007) (recognizing Justice Kennedy’s opinion as the “controlling rule of law”) with *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 780–81 (9th Cir. 2011) (the court did not “foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality’s standard”) and *Sequoia Forestkeeper v. United States Forest Service*, No. CV F 09-392 LJO JLT, 2011 U.S. Dist. LEXIS 26447, at 12–13 (E.D. Cal. 2011) (interpreting *Wilcox* as a “change in the controlling law” and applying the plurality test). A significant number of post-*Rapanos* cases have been decided in jurisdictions where courts seek to avoid resolving which test controls by

applying both the plurality’s test and the significant nexus test. *See, e.g., United States v. Hamilton*, 952 F. Supp. 2d 1271, 1274 (D. Wyo. 2013) (“The Tenth Circuit has yet to decide which of these tests controls . . . [b]ut happily, this Court need not choose here”); *United States v. Cundiff*, 555 F.3d 200, 207–210 (6th Cir. 2009) (reserving the issue of which test controls); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 215–18 (2d Cir. 2009), *aff’g Simsbury-Avon Pres. Soc’y, LLC. V. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 224–230 (absent binding instruction, “this Court will consider . . . both the plurality’s and Justice Kennedy’s standards”); *Haniszewski v. Cadby*, No. 03-CV-0812, 2013 U.S. Dist. LEXIS 179359, at 19 (W.D.N.Y. 2013) (applying the plurality’s test); *Foti v. City of Jamestown Bd. Of Pub. Utils.*, No. 10-CV-575, 2011 U.S. Dist. LEXIS 119540, at 41–43 (W.D.N.Y. 2011) (applying the significant nexus test).

Clearly, this inconsistent and unpredictable state of affairs regarding which waters are “waters of the United States” does not serve to protect water quality, the interests of States in implementing federal and their own state water pollution control programs, nor the interests of the public and private entities – and people – who implement activity that is subject to regulation if performed within jurisdictional waters.

The Proposed Rule Ensures the Statute’s Protection of State Waters Downstream of Other States

The proposed “waters of the United State” rule is grounded in solid, peer-reviewed science. A EPA report on more than 1,200 peer-reviewed and published scientific studies shows the connectedness of upstream and downstream water,⁹ In its review of the draft report, the EPA Scientific Advisory Board found that it “provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connect to downstream waters.”¹⁰ The Board also found that the report substantiated “the conclusion that floodplains and waters and wetlands in floodplain settings support the physical, chemical, and biological integrity of downstream waters.” Because of these connections, pollution from wetlands and relatively small or infrequently flowing upland streams impacts the health of associated larger downstream waters (such as rivers, lakes, estuaries, and oceans).

⁹ See EPA Office of Research and Development, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (January 15, 2015).

¹⁰ See letter from Dr. David T. Allen, Chair, Scientific Advisory Board, and Dr. Amanda D. Rodewald, Chair, SAB Panel for the Review of EPA Water Body Connectivity Report to the Honorable Gina McCarthy, Administrator, EPA (October 17, 2014).

Each of the forty-eight continental states has a traditional navigable river or lake within its borders with a portion of that waterbody within the borders of one or more other states. (See attached Appendix.) And each of the continental states is both *upstream* and *downstream* of one or more other states. New York, for example, is downstream of 13 states, and is upstream of 19 states. (See attached maps of States Upstream and Downstream of New York.)

The “waters of the United States” rulemaking advances the Clean Water Act’s protection of state waters downstream of other states by securing a national, federal “floor” for water pollution control, thereby maintaining the consistency and effectiveness of the downstream states’ water pollution programs. The federal statute preempts many common-law remedies traditionally used to address interstate water pollution, leaving the act and its regulatory provisions as the primary mechanism for protecting downstream states from the effects of upstream pollution.¹¹ Critically, by protecting interstate waters, the proposed rule allows states to avoid imposing disproportionate limits on in-state private and public sources to offset upstream discharges which might otherwise go unregulated.

A Robust Clean Water Act is Economically Critical to States and Municipalities

A robust Clean Water Act is important to States and municipalities because it not only protects our waters but it saves billions of dollars in taxpayer money. For example, the New York City Watershed is a 2000 square mile area located primarily in upstate New York. It is the source of drinking water for 9 million residents. Nearly all of the City’s water is unfiltered, and that’s a good thing. To build a filtration plant to clean the water would cost taxpayers over \$10 billion in capital and millions more in annual operation and maintenance. But the City does not have to build that enormously expensive plant. That’s because the Clean Water Act and other pollution prevention programs work together to prevent the water from getting “dirty” in the first place so that it does not need to be filtered. The water pollution prevention measures that protect New York City’s drinking water supply are a prime example that an ounce of prevention truly is worth a pound of cure.

In addition to saving States and municipalities – and thereby, taxpayers – money, clean water is critical to wildlife, and wildlife is vitally important to States’ commercial and recreational interests. A survey by the U.S. Fish & Wildlife Service

¹¹ See *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (federal common law preempted by Clean Water Act); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (common law of an affected state preempted).

and U.S. Census Bureau found that in 2011, residents and non-residents spent \$9.2 billion on wildlife recreation – hunting, angling and watching wildlife – in New York.¹² The American Sportfishing Association’s 2013 *Sportfishing in America* report found that New York ranked #2 among the States by angler expenditures (after Florida), with retail sales totaling nearly \$2.7 billion, and the multiplied or ripple economic effect totaling nearly \$4.5 billion.¹³

Thus, New York’s economy is linked to clean water, which in turn relies on the efficient and consistent application of the Act’s jurisdiction to waters upstream of the State.

Conclusion

The “waters of the United States” rulemaking is an important action to advance the Congressional objective embodied in the Clean Water Act “to restore and maintain the chemical, physical and biological integrity of the Nation’s Waters.” 33 U.S.C. § 1251(a). The rulemaking seeks to establish clear categories of waters within the protection of the law. The proposed rule is based on sound science, and takes into account the practical and ecological realities of our Nation’s interconnected waters. Clarifying the “waters of the United States” will serve to protect water quality, promote the consistent and efficient implementation of state water pollution programs across the country in accordance with the principles of “cooperative federalism” on which this landmark statute is based, and serve the interests of public and private entities involved in activities subject to the Act.

We look forward to completion of a final rule.

¹² U.S. Fish & Wildlife Service and U.S. Census Bureau, *2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation – New York* at 5.

¹³ American Sportfishing Association, *Sportfishing in America* (2013) at 5, 8.

APPENDIX

Navigable Water Within Each Continental U.S. State With a Portion of the River or Lake in One or More Other States¹

State	Navigable Water	States with Upstream or Border Portions	Notes
AL	Chattahoochee River	GA	1
AZ	Colorado River	CO, UT, NV, CA	1
AR	Arkansas River	CO, KS, OK	1
CA	Colorado River	CO, UT, AZ, NV	1
CO	Navajo Reservoir (San Juan River)	NM	2,3
CT	Connecticut River	NH, MA, VT	1
DC	Potomac River	WV, VA, MD	1
DE	Delaware River	NY, PA, NJ	1
FL	Apalachicola River	GA	1
GA	Savannah River	SC	1
ID	Snake River	WY, OR, WA	1
IL	Lake Michigan	MI, WI, IN	1

¹This table lists only one water body for each State, although most States have many such water bodies. For purposes of this appendix, the District of Columbia is treated as a State.

State	Navigable Water	States with Upstream or Border Portions	Notes
IN	Lake Michigan	MI, WI, IL	1
IA	Missouri River	MT, ND, SD, NE	1
KS	Missouri River	MT, ND, SD, NE, IA, MO	1
KY	Mississippi River	MN, WI, IA, IL, MO, TN	1
LA	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, MS	1
ME	Piscataqua River	NH	1
MD	Potomac River	WV, VA, DC	1
MA	Connecticut River	NH, VT	1
MI	Lake Michigan	IN, WI, IL	1
MN	Mississippi River	WI	1
MS	Mississippi River	MN, WI, IA, IL, MO, KY, TN, AR, LA	1
MO	Missouri River	MT, ND, SD, NE, IA, KS	1
MT	Yellowstone River	WY	1
NE	Missouri River	MT, ND, SD, IA, MO	1

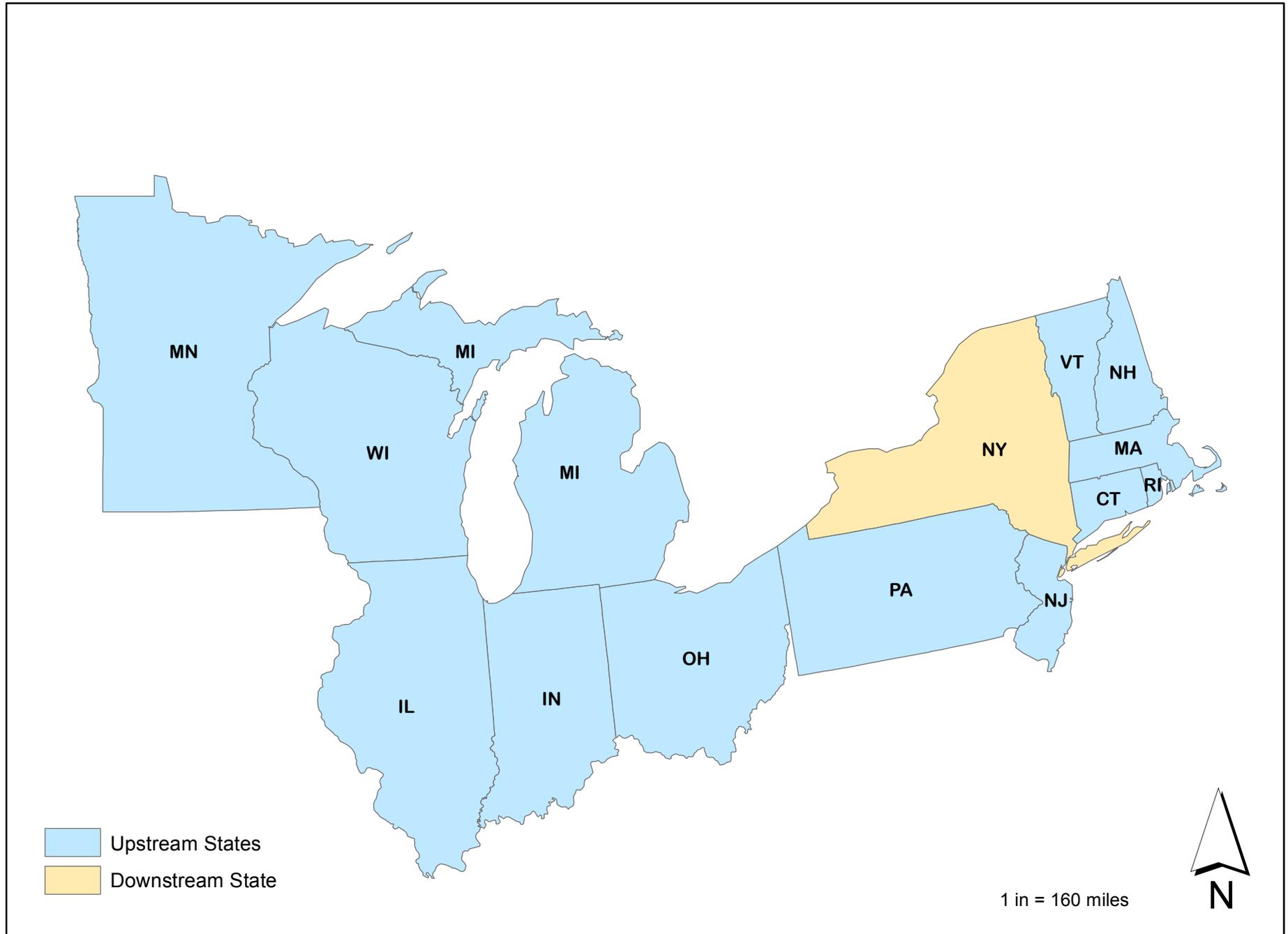
State	Navigable Water	States with Upstream or Border Portions	Notes
NV	Colorado River	CO, UT, AZ	2
NH	Piscataqua River	ME	1
NJ	Delaware River	NY, PA, DE	1
NM	Navajo Reservoir (San Juan River)	CO	2,3
NY	Delaware River	PA	1
NC	Roanoke River	VA	1
ND	Missouri River	MT	1
OH	Ohio River	PA, WV, KY	1
OK	Arkansas River	CO, KS	1
OR	Snake River	WY, ID	1
PA	Delaware River	NY, NJ	1
RI	Mount Hope Bay	MA	1
SC	Savannah River	GA	1
SD	Missouri River	MT, ND, NE	1
TN	Mississippi River	MN, WI, IA, IL, MO, KY, AR	1
TX	Rio Grande	CO, NM	1
UT	Green River	WY, CO	2,4

State	Navigable Water	States with Upstream or Border Portions	Notes
VT	Lake Champlain	NY	5
VA	Potomac River	WV, MD, DC	1
WA	Columbia River	OR	1
WV	Ohio River	PA, OH	1
WI	Mississippi River	MN, IA	1
WY	Green River (Flaming Gorge Reservoir)	UT	2

Notes

1. U.S. Army Corps of Engineers, *Bridges Over the Navigable Waters of the United States* (1961).
2. *Comments of the Western Water Alliance to the U.S. Environmental Protection Agency*, Docket ID OW-2002-0050, April 16, 2003.
3. *Wreyford v. Arnold*, 477 P.2d 332 (N.M. 1970).
4. *United States v. Utah*, 283 U.S. 801 (1931).
5. U.S. Army Corps of Engineers, *Navigation in Vermont*, <http://www.nae.usace.army.mil/water/navigation2.asp?mystate=VT> (accessed January 11, 2006).

States Upstream of New York



States Downstream of New York

