September 3, 2021

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U.S. Environmental Protection Agency
EPA Docket Center
Attention: Docket # EPA-HQ-OW-2021-0328
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations, 86 Fed. Reg. 41,911 (Aug. 4, 2021), Docket # EPA-HQ-OW-2021-0328

Dear Docket Clerk,

Thank you for the opportunity for GPA Midstream to provide pre-proposal comments to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "the Agencies") on the Agencies' intention to issue two new proposed rulemakings regarding the definition of "Waters of the United States." 86 Fed. Reg. 41,911 (Aug. 4, 2021) ("Request for Comments").

GPA Midstream has served the U.S. energy industry since 1921 and has approximately 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that gather, move, and process vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products, and crude oil from production areas to markets, commonly referred to as "midstream activities," across the U.S. GPA Midstream members account for more than 90% of the NGLs—such as ethane, propane, butane, and natural gasoline—produced or recovered in the U.S. from more than 400 natural gas processing facilities. The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy.

I. The Agencies Have Not Identified any Basis for Rescinding the Navigable Waters Protection Act

The agencies' Request for Comments omits a key issue: a rationale for substantially revising the current Navigable Waters Protection Rule. GPA Midstream believes that the Navigable Waters Protection Rule succeeded in simplifying the definition of "Waters of the United States" in a manner consistent with the Clean Water Act's text and goals. To date, there is no indication that the Navigable Waters Protection Rule has resulted in significant water pollution or the destruction of non-jurisdictional waters. Indeed, the Request for Comments does not even seek information on the actual effects of the Navigable Waters Protection Rule. Instead, the agencies purport to have that information already, claiming that the intention to revise the definition of "Waters of the United States" is premised on "concerns" regarding "the integrity of the nation's waters." 86 Fed. Reg. at 41,912. The agencies, however, have chosen not to disclose those

"concerns" to the public. The Request for Comments presented no data regarding the purported effects of the Navigable Waters Protection Rule and, given that it has only been operative for little more than a year, there likely is little data at this point in time to carefully understand the practical effects of the Rule. GPA Midstream strongly urges the agencies to disclose the bases for their "concerns," including what attempts they have made to gather information regarding the effects of the Navigable Waters Protection Rule, prior to embarking on a proposed rulemaking to change it.

GPA Midstream should note that, while the prior administration's rescission of the 2015 Clean Water Rule has some surficial similarity to the agencies' current intentions to rescind the Navigable Waters Protection Rule, there is a significant difference. The 2015 Clean Water Rule had numerous and obvious legal deficiencies. By the time the Navigable Waters Protection Rule was promulgated in 2020, the 2015 Clean Water Rule was enjoined by multiple district courts, rendering it inoperative in 28 states. See Texas v. EPA, 389 F. Supp.3d 497 (S.D. Tex. 2019); Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); North Dakota v. EPA, 127 F. Supp. 3d 1047 (D. N.D. 2015).[1] The Navigable Waters Protection Rule lacked these legal deficiencies with courts declining to enjoin its operation. See California v. Wheeler, 467 F. Supp. 3d 864 (N.D. Cal. 2020) (denying motion for preliminary injunction); State v. U.S. EPA, 989 F.3d 874 (10th Cir. 2021) (reversing preliminary injunction issued by district court for abuse of discretion). To the extent that the agencies believe that the Navigable Waters Protection Rule exceeds the authority granted to the agencies under the Clean Water Act or was issued in violation of the Administrative Procedure Act, the agencies have not disclosed the basis for such a belief. Although GPA Midstream appreciates the request for pre-proposal comment, we believe that even this step is premature. The agencies should first publicly disclose whatever bases they may have for believing that the Navigable Waters Protection Rule is so fundamentally flawed, legally or practically, that it cannot be saved through minor revisions before starting down a road towards rescission.

GPA Midstream continues to support the Navigable Waters Protection Rule as its general simplification of the definition of "waters of the United States" provides regulatory certainty and clarity that prior versions of the definition lacked. The Rule did so while protecting waters and wetlands that are clearly federal and nature and honoring the principles in the Clean Water Act itself. The Clean Water Act clearly rejects the notion that the Agencies should regulate as many waters, wetlands, and other features as it can plausibly justify under Congress' commerce power. The Act clearly states that it is "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources." 33 U.S.C. § 1251(b). Contrary to what some commenters have claimed in the past, Congress did not believe that waters and wetlands beyond federal jurisdiction are "unregulated." Instead, Congress believed that State and local jurisdictions had the primary responsibility for regulation. Any revised definition of "waters of the United States" should honor this Congressional policy.

[1] A fourth court issued a nationwide preliminary injunction against the 2015 Clean Water Rule as likely violating the Administrative Procedure Act. In re EPA, 803 F.3d 804 (6th Cir. 2015). This nationwide injunction was vacated only for technical jurisdictional reasons. Nat'l Ass'n of Mfrs. v. Dep't of Defense, 138 S. Ct. 617 (2018).

II. The Agencies Should Consider Restoring the Pre-2015 Regulations as Step One of Their Planned Two-Step Process

Given that the Agencies have pre-determined that they will rescind the Navigable Waters Protection Rule, GPA Midstream understands that the Agencies intend to use a two-step process for revising the definition of "Waters of the United States." At first glance, step one appears to be a relatively uncontroversial restoration of the pre-2015 definition. However, some language in the Request for Comments indicates that step one will involve significant controversy and uncertainty. The Request for Comments states that the "Step One" rulemaking, referred to as the "foundational rule" "will propose to restore the regulations defining 'waters of the United States' that were in place for decades until 2015, with updates to be consistent with relevant Supreme Court decisions." 86 Fed. Reg. at 41,911 (emphasis added). The regulations defining "Waters of the United States" were largely promulgated in 1988. 80 Fed. Reg. 37,053, 37,056 (June 29, 2015). Updating those regulations to account for relevant Supreme Court decisions would be a major undertaking. The "relevant Supreme Court decisions" since the 1988 regulations include Solid Waste Agency of Northern Cook County ("SWANCC") v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), Rapanos v. United States, 547 U.S. 715 (2006) and County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020). Each decision raised an extremely complex and controversial aspect of how "Waters of the United States" are defined. These issues have already been the subject of numerous guidance documents that have largely been panned by both environmental groups and industry for failing to fully grapple with the Court's decisions.

By promulgating new regulations based on the Agencies' interpretations of these opinions, any "foundational rule" would involve a substantial change to the existing definition of "Waters of the United States," a prolonged period of time to complete the rulemaking, and almost certainly engender legal challenges from State attorneys general, environmental groups, and industry groups. This "foundational rule," on which the agencies intend to "further refine[ ] and build[ ] upon" in a step two rulemaking, 86 Fed. Reg. at 41,911, will be tied up in courts for years. Challenges will now be lodged in district courts around the country, in accordance with National Association of Manufacturers. v. Department of Defense, 138 S. Ct. 617 (2018), increasing the likelihood of circuit splits and the eventual need for the Supreme Court to intercede. Thus, the agencies' planned "foundational rule" may not have its foundation established for several years, assuming that it is not eventually vacated and remanded. In the meantime, the country will likely be subject to a patchwork of different regulations. This was illustrated by challenges to the 2015 Clean Water Rule, where 22 states were subject to the Rule and 28 states subject to pre-2015 regulations after the Rule was enjoined.

GPA Midstream believes that the agencies should retain the Navigable Waters Protection Rule. However, if the agencies have already determined that a revision is necessary, GPA Midstream recommends a simple restoration of the pre-2015 rules. Although these rules were not perfect, they are at least familiar to both the agencies and regulated industries. Further, they will work as a more reliable interim "foundation" as they are likely to be less vulnerable to prolonged legal challenges. Any changes to these rules, such as "updates" to account for Supreme Court decisions, should wait until step two of the agencies' planned process.

III. Issues for Which the Agencies Have Requested Comment

The agencies have requested comment on nine specific issues. 86 Fed. Reg. at 41,913-14. GPA Midstream provides comments on most of those issues below.

A. Implementation Under the Pre-2015 Rules and 2015 Clean Water Rule

The pre-2015 rules were certainly imperfect. In large measure, they were overly complicated and often involved a ponderous and expensive process for jurisdictional determinations that, until Sackett v. EPA, 566 U.S. 120 (2012), could not be challenged in court. The value of time expended in jurisdictional determinations, as well as the frequent need for technical consultants and lawyers, imposed a disproportionate burden on smaller businesses. Further, the jurisdictional determination process too often devolved into an ad hoc evaluation that took a very expansive view of Corps jurisdiction. Courts are rife with scenarios where the Agencies viewed "adjacent" waters or wetlands as being miles away from any navigable water, draining any meaning from the term and hindering the ability for the regulated public to understand the law. See, e.g., United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (Corps asserted jurisdiction over a property "adjacent to" a roadside ditch that "takes a winding, thirty-two-mile path to the Chesapeake Bay"); Rapanos, 547 U.A. at 720, 729 (defendant Rapanos' fields were 11 to 20 miles away from the nearest navigable water but "adjacent to" drains and ditches); Precon Dev. Corp., Inc. v. U.S. Army Corps of Engr'rs, 633 F.3d 278, 282 (4th Cir. 2011) (Corps asserted jurisdiction over wetlands through a series of drains and ditches three to four miles from the nearest navigable-in-fact water). The Navigable Waters Protection Act curbed these abuses by implementing a common sense understanding of jurisdictional waters, including "adjacent" lands and waters, that are more faithful to the Clean Water Act's text and purpose.

The 2015 Clean Water Rule was enjoined for most states where GPA Midstream's members operate. For this, our members are thankful. The 2015 Clean Water Rule took an overly complicated set of regulations and made them more complicated; it took an overly expansive view of federal jurisdiction and expanded it even further. As a result, it increased regulatory uncertainty through vague terms and narrow, impractical exemptions while asserting jurisdiction over broad swaths of dry land, infringing upon the States' traditional powers over land regulation. Indeed, the 2015 Clean Water Rule went well beyond the authority that Congress conferred upon the Agencies under the Clean Water Act and likely beyond Congress' Commerce Clause power. The Agencies themselves acknowledged this in lamenting that the "2015 Rule reached so far into the landscape that, as commenters noted, it was difficult to know whether their lands are subject to federal jurisdiction … This expansive and uncertain cloud of potential federal regulation over all or potentially all water features within an entire watershed raises the very concerns that the constitutional avoidance doctrine" is "designed to address." 84 Fed. Reg. 56,626, 56,656 (Oct. 22, 2019). The overly complicated, and almost certainly unlawful, 2015 Clean Water Rule should not be exhumed.

B. Science

The Agencies have requested information regarding scientific studies "related to how streams, wetlands, lakes, and ponds restore and maintain the chemical, physical, and biological integrity of the nation's waters" since the 2015 "Connectivity Report." 86 Fed. Reg. at 41,913. Neither the Connectivity Report, or any subsequent similar studies, have any relevancy in defining

"Waters of the United States." The 2015 Clean Water Rule used the Connectivity Report to claim that, since virtually all waters (and dry lands) have some chemical, physical, or biological connection, then virtually all waters (and dry lands) are subject to federal regulation. 80 Fed. Reg. at 37,057. The agencies then claimed that defining "Waters of the United States" "requires scientific and policy judgment, as well as legal interpretation," citing the "significant nexus" rationale in Justice Anthony Kennedy's lone Rapanos concurrence. Id. This is incorrect.

Justice Kennedy did not, and cannot, re-write the text of the Clean Water Act or single-handedly reverse the corpus of Supreme Court cases interpreting the Act. Nothing in his concurrence authorizes the 2015 Clean Water Rule's approach of regulating virtually all water, regardless of whether it may be as groundwater, isolated ponds, or desert washes.[2] Congress only permitted the regulation of "navigable waters," meaning "Waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(7), (12). And although the Supreme Court has held that this may include wetlands abutting navigable-in-fact waters, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985), it has previously warned the agencies that extending regulation beyond navigable waters is to go beyond Congress' Commerce Clause power. SWANCC, 531 U.S. at 172. Thus, Riverside Bayview stakes the outer limits of what the Supreme Court views as the extent of the Clean Water Act. Defining "Waters of the United States," which must fall somewhere within Riverside Bayview but not beyond SWANCC, is a legal interpretation. Nothing in the Act authorizes the agencies to dramatically expand regulation beyond "navigable waters," or to contract regulation, based on whatever report agency advisors might generate at any given moment.

Premising any definition of "Waters of the United States" on the Connectivity Report, or an updated version of it, would be a text-book illustration of arbitrary and capricious decision making. "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." Motor Vehicle Mfrs. Ass'n. v. State Farm Mu. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Massachusetts v. EPA, 549 U.S. 497, (2007) (vacating EPA's refusal to define greenhouse gases as an "air pollutant" because, even though the statute provides discretion to use "judgment," "the use of the word 'judgment' is not a roving license to ignore the statutory text … but a direction to exercise discretion within defined statutory limits."). North Carolina v. EPA, 531 F.3d 896, 907-08 (D.C. Cir. 2008) (striking down Clean Air Interstate Rule emission trading program as it was premised on being "cost-effective," a factor that the Clean Air Act's text did not permit EPA to consider). Any definition of "Waters of the United States" must be anchored on the term "navigable" – even under Justice Kennedy's "significant nexus" approach. *See* 84 Fed. Reg. 4,154, (Feb. 14, 2019) ("interpreting the statutory reach of 'waters of the United States' … is ultimately a legal determination based on the language and structure of the Act and applicable judicial precedent."). The agencies cannot simply commission a report to drop the statutory anchor of "navigable waters."

[2] Even Justice Kennedy rebuked the approach taken in the 2015 Clean Water Rule, scolding the dissenting Justices for reading "a central requirement out" of the Clean Water Act "namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance" as this "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." 547 U.S. at 778 (Kennedy, J., concurring).

The Clean Water Act's structure establishes that Congress never intended the definition of "waters of the United States" to turn on the content of scientific studies. When Congress wanted agencies to base regulations on scientific or technical information, it knew how to say so. For instance, in listing toxic pollutants, the EPA Administrator must consider such scientific data such as the "toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the effect of the toxic pollutant on such organisms." 33 U.S.C. § 1317(a)(1). The Clean Water Act is replete with regulatory standards established or updated by scientific or technical studies. *See*, *e.g.*, 33 U.S.C. § 1311(b)(2)(A) (effluent limitations for point source categories based on "best available technology economically achievable" and information developed by the National Study Commission established under 33 U.S.C. § 1325); 33 U.S.C. § 1316(a)(1) ("standard of performance" is determined based on "the best available demonstrated control technology, processes, operating methods, or other alternatives"); 33 U.S.C. § 1326(b) (regulation of cooling water intake structure standards will be based on "the best technology available"). By contrast, Congress defined "navigable waters" as meaning the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Nothing about this definition, especially when compared to other major provisions in the Clean Water, provides discretion to update and expand the definition of "waters of the United States" based on scientific or technical studies, regardless of their merit. These studies are simply factors "which Congress has not intended [the Agencies] to consider" State Farm, 463 U.S. at 43.

C. Environmental Justice Interests and Climate Implications

The Agencies requested comments on, among other things, how "the jurisdictional status of waters be linked to environmental justice concerns" and how "should the agencies account for the effects of a changing climate in identifying jurisdictional waters?" The Agencies cannot consider either issue in defining "Waters of the United States" as these issues have no relationship to the navigability of waters. As with the Agencies' evident intent to resurrect the Connectivity Report, environmental justice and climate change are factors "which Congress has not intended [the Agencies] to consider." State Farm Mu. Auto. Ins. Co., 463 U.S. at 43. Nor does anything in the Clean Water Act's text appear to give the Agencies authority to modify the definition of "Waters of the United States" depending on who lives near those waters or how those waters may be effected by specific pollutants or climatic effects. GPA Midstream understands that environmental justice and climate change are priorities for the administration, but the Clean Water Act provides no room for the Agencies to shoehorn these issues into the statutory text.

D. The Scope of Jurisdictional Tributaries and Jurisdictional Ditches

The Agencies, evidently seeking to re-assert jurisdiction over ephemeral streams and certain non-navigable tributaries and ditches, requested comment on a multitude of factors to be considered in defining a "Water of the United States," including "indicators of channelization; physical indictors such as indicators of ordinary high water mark; flow regime; flow duration; watershed size; landscape position; stream network density; or distance from a traditional navigable water…." 86 Fed. Reg. at 41,913. The Agencies seek comment on a similar slew of considerations for ditches ("flow regime, physical features, excavation in aquatic resources versus uplands, type or use of the ditch (*e.g.*, irrigation and drainage), biological indicators like presence of fish…."), which they appear to already presume to be largely jurisdictional. Id. These requests illustrate the very issues that the Navigable Waters Protection Act largely succeeded in resolving:

that the scheme for determining federal jurisdiction was vague, subjective, rested on innumerable variables to be determined on a case-by-case basis, and deprived landowners of any real understanding of their obligations under the Clean Water Act. This accounts for the swath of court cases where landowners are subject to civil and criminal prosecution for developing what appears to all but the Corps to be anything other than "Waters of the United States."

GPA Midstream strongly discourages a return to the days where jurisdictional determinations required landowners to hire consultants and lawyers to engage in lengthy debates on vegetation types or the nature of concrete ditches. This problem was only exacerbated by the "significant nexus" and the Agencies' subsequent interpretation of it, requiring the consideration of an open-ended list of amorphous considerations including "flow characteristics and functions," "hydrologic factors," such as the "volume, duration, and frequency of flow," "certain physical characteristics" of potentially jurisdiction features, and various "ecological factors." EPA and Corps, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (Dec. 2, 2008) at 7.

The Clean Water Act is applied to a "broad range of ordinary industrial and commercial activities," Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari), including those conducted by small, lightly regulated businesses and individuals. This was most effectively demonstrated in Sackett where EPA demanded heavy civil penalties from a couple who were merely trying to build a home in an already developed residential neighborhood. All those that would be regulated by federal law should be able to discern what obligations they have, if any, under that law without deploying a platoon of consultants and lawyers. Significant time and money must be expended even in the case where there is no actual federal jurisdiction. First instance, Deerfield Plantation v. U.S. Army Corps of Engineers, 801 F. Supp. 2d 445, 454-56 (D. S.C. 2011) documents how the Corps required a review of aerial photographs, internal records, U.S. Department of Agricultural soil surveys, U.S. Geological Survey records, a wetland inventory from the U.S. Fish & Wildlife Service, and two on-site inspections by the Corps only to determine a lack of federal jurisdiction for most of the property.

At other times, however, overly complicated definitions of "Waters of the United States" deprive landowners of the ability to discern their obligations under federal law. For instance, in United States v. Bailey, 516 F. Supp. 2d 998, 1008-09 (D. Minn. 2007), the Corps asserted federal jurisdiction over the defendant's property based on 46 soil samples, examinations of vegetation, tree counts, and an expert ecologist's opinion on changes to the site over time. The court there actually scolded the defendant for attempting to understand whether or not the Clean Water Act applied to his property because "[h]e obviously lacks the expertise necessary in identifying wetlands" and "failed to show that any of his observations are relevant to determining to what extent the Site is a wetland." Id.[3] No person should be subject to such a Kafka-esque set of regulations where, as a matter of law, their own knowledge and understanding cannot allow them to determine whether or not their actions are lawful or not. It is one thing to say that ignorance of the law is no excuse, but this presumes a system where it is possible to know the law. Where overly

[3] Notably, the court dismissed the defendant's reliance on the State environmental agency's determination that the property was not a jurisdictional wetland because it held that the State agency lacked the appropriate expertise to determine whether or not federal law applied. Id. at 1009-10.

complicated regulatory schemes turn on subjective factors such as "flow regime," "stream network density," or "landscape position," one cannot make a good faith determination as to whether the law applies. This is especially important where a landowner's failure to guess correctly could subject them to civil penalties up to $55,800 per day and criminal penalties, including up to one year in prison and $25,000 daily fines for even negligent violations. 33 U.S.C. §§ 1319(c), (d); 85 Fed. Reg. 1,751 (Jan. 13, 2020) (civil monetary penalty inflation adjustment for the Clean Water Act).

Regulatory simplicity benefits both the regulated and the regulators. Interpretations of "waters of the United States" that rely on relatively obvious and common sense features put landowners on notice of when their property is likely subject to federal jurisdiction. In most cases, a simplistic and common sense definition will avoid the expenditure of hundreds of thousands of dollars on consultants and lawyers, as well as many months of delay, as well as the need to tie up Corps personnel in complex, contentious, and fact-specific analyses. It further provides a clearer delineation for state regulators who have "primary responsibilities" over the pollution of waters and wetlands. 33 U.S.C. § 1251(b). GPA Midstream urges the Agencies to maintain the Navigable Waters Protection Rule as its more simplified approach to defining "Waters of the United States" is easier for all parties to understand while honoring the text and the goals of the Clean Water Act.

E. The Scope of Adjacency

With respect to the various "adjacent" waters described in the Request for Comments, the Navigable Waters Protection Rule adheres to the Supreme Court's ruling in Riverside Bayview, which should be viewed as the outer limits of the Agencies' authority over wetlands. As described in the Rule's preamble, the Supreme Court acceded to the Agencies' view that it may regulate physically adjacent wetlands "because they are 'inseparably bound up' with navigable waters and 'the Corps must necessarily choose some point at which water ends and land begins.'" 85 Fed. Reg. 22,250, 22,256 (Apr. 21, 2020) (quoting Riverside Bayview, 474 U.S. at 131-35 & n. 9). This demarcation "is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one" as there are "a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land." Riverside Bayview, 474 U.S. at 132. In other words, the Supreme Court upheld the regulation of adjacent wetlands because identifying "the limit of 'waters' is far from obvious." Id.

Riverside Bayview was not an invitation to regulate any and all wetlands, ephemeral streams, trickling tributaries, groundwater, and concrete ditches that may be have some tenuous connection to a navigable water miles away. Where wetlands are separated from jurisdictional waters by berms, roads, culverts, ditches, or any other manner of obstacle, the difficulty in delineating non-navigable wetlands from navigable waters is easy and obvious. The problem presented in Riverside Bayview, where wetlands and waters are "inseparably bound up" and requiring a difficult decision as to where "water ends and land begins" is absent. 474 U.S. at 132, 134. If a relationship can only be established through expert studies of hydraulic connections, biological functions, dye tracer tests, or other non-obvious means, then Riverside Bayview is inapplicable and there is no justification for federal jurisdiction. This is the entire point behind the Navigable Waters Protection Act's requirement of a "continuous surface connection." See 85 Fed. Reg. at 22,267 (relying on discussions in Riverside Bayview and Rapanos). GPA Midstream believes that such a connection should be maintained as a requirement for regulating adjacent, but

otherwise non-jurisdictional, wetlands, lakes, ponds, and other features as the inability to distinguish where one begins and the other ends is necessary for federal jurisdiction.

F. Exclusions from the Definition

Both the Navigable Waters Protection Act and the 2015 Clean Water Rule included multiple exclusions from the definition of "Waters of the United States" (the pre-2015 rule had only a single exclusion for certain waste treatment systems). Many of those in the 2015 Clean Water Rule are confusing, filled with multiple conditions, and once understood, appeared to be very narrow. Those under the Navigable Waters Protection Act are the most useful and easy to understand. It should be noted, however, that both had overlapping exclusions to some degree. GPA Midstream believes that this indicates broad agreement on what is not a "Water of the United States."

1. Waste treatment systems.

This is the only exclusion that has endured through all three versions of the definition. 40 C.F.R. § 328.3(b)(12); former 40 C.F.R. § 328.3(b)(2)(1) (2015 Clean Water Rule); former 40 C.F.R. § 232.2(1)(q) (1988 regulations). These waste treatment systems have been excluded since 1979, 80 Fed. Reg. at 37,059, and GPA Midstream believes that this should be maintained.

2. Groundwater

Both the Navigable Waters Protection Act, 40 C.F.R. § 328.3(b)(2) and the 2015 Clean Water Rule, former 40 C.F.R. § 328.3(b)(5), exempted groundwater "including groundwater drained through subsurface drainage systems." Because groundwater cannot be "navigable" in any way, GPA Midstream supports the maintenance of this exemption.

3. Stormwater control features

The respective exemptions for stormwater control features are largely similar. The 2015 Clean Water Rule exempted stormwater control features "constructed to convey, treat, or store stormwater that are created in dry land." Former 40 C.F.R. § 328.3(b)(6). The Navigable Waters Protection Act slightly expanded the exemption to include stormwater control features constructed or excavated "in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off." 40 C.F.R. § 328.3(b)(9). It reasonably holds that non-jurisdictional waters cannot become jurisdictional merely through interaction with an exempt stormwater control feature. This expansion is sensible and should be retained.

4. Water-filled depressions

"Water-filled depressions" excavated incidental to mining or construction activity have been excluded under the Navigable Waters Protection Act and the 2015 Clean Water Rule, with some minor differences in language. 40 C.F.R. § 328.3(b)(9) (Navigable Waters Protection Rule); former 40 C.F.R. § 328.3(b)(4)(v). These depressions, created as part of industrial activity and often dry unless holding some minor volume of rainwater, are not "navigable waters" under the Clean Water Act.

There are two major differences in the exemptions between the Navigable Waters Protection Act and the 2015 Clean Water Rule. The first is the treatment of ephemeral features. The 2015 Clean Water Rule exempted "Erosional features, including gullies, rills, and other ephemeral features" so long as they "do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways." Former 40 C.F.R. § 328.3(b)(6)(vi). These exemptions to the exemption – particularly the requirement that the ephemeral feature not meet the definition of a tributary – rendered former § 328.3(b)(6)(vi) virtually meaningless given the 2015 Clean Water Rule's overly broad definition of tributary. Former 40 C.F.R. § 328.3(c)(3). The Navigable Waters Protection Rule simplified this exemption, exempting all "[e]phemeral features, including ephemeral streams, swales, gullies, rills, and pools." 40 C.F.R. § 328.3(b)(3). These features are not "navigable waters" under the Act as they are generally temporary flows of relatively low volume that persist for very short periods of time after a rain event, such as flow through the low spot of a residential garden to a storm drain that eventually connects to a tributary water. These temporary ephemeral features are ubiquitous on dry lands, are not navigable, not used for interstate commerce, and cannot be made susceptible for use in interstate commerce. Regulating these ephemeral flows is generally impractical due to their ubiquity and leads to absurd results that could never have been intended by Congress, such as the regulation of arid desert land as "tributaries." See Rapanos, 547 U.S. at 727 (discussing Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1118 (9th Cir. 2005)). Regulating dry lands such as backyards, gardens, and athletic fields as "tributaries" goes well beyond any conceivable definition of "navigable waters," likely exceeds Congress' Commerce Clause power, and impinges on traditional state and local land use regulation. GPA Midstream recommends that the Agencies avoid difficult constitutional questions by declining to narrow the existing exemption for ephemeral features.

The second major difference between the rules is their treatment of ditches. The regulations currently exempt ditches that are not traditional navigable waters, tributaries to those waters, or constructed in jurisdictional wetlands. 40 C.F.R. § 328.3(b)(5). This is a significant improvement over the 2015 Clean Water Rule that, on its face exempted ditches, but included so many complicated qualifications that the exemption was not useful for any purpose. See Former 40 C.F.R. §§ 328.3(b)(3)(i)-(iii) (regulating ditches with ephemeral flow if they are "a relocated tributary or excavated in a tributary," with intermittent flow that drains wetlands, and/or flow "either directly or through another water" to any jurisdictional water). The 2015 Clean Water Rule exemption only clouded an already confusing aspect of "Waters of the United States" by continuing to regulate ditches that were not navigable, tributaries to navigable waters, or "inseparably bound up" with navigable waters, as described in Riverside Bayview. GPA Midstream urges the Agencies to retain the existing exemption for ditches as it provides much needed regulatory clarity while continuing to regulate ditches that meet the definition of "tributary" under 40 C.F.R. § 328.3(c)(12).

Conclusion

GPA Midstream believes that a simplified and easier to understand definition of "Waters of the United States," as found in current law, is more consistent with the intent of Congress and U.S. Supreme Court precedent than under the 2015 Clean Water Rule. The importance of crafting a definition that reduces regulatory uncertainty, permitting timelines, and costs to the success of energy infrastructure projects cannot be understated. GPA Midstream looks forward to working with the Agencies in moving towards this goal.

Respectfully submitted,

Matt Hite
Vice President of Government Affairs
GPA Midstream Association