



April 12, 2019

**Via Regulations.gov**

U.S. Environmental Protection Agency  
Mail Code: 4203M  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: Comments in Response to Revised Definition of “Waters of the United States,” Proposed Rule, Docket EPA-HQ-OW-2018-0149**

Dear Sir or Madam,

The GPA Midstream Association (“GPA Midstream”) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, “the Agencies”) on their proposed rule to revise the Clean Water Act regulations defining “waters of the United States.” 84 Fed. Reg. 4,154 (Feb. 14, 2019). This proposed rulemaking is “Step Two” in the Agencies’ process to provide clarity, predictability, and fair notice to industry and landowners that may be regulated under the Clean Water Act.

In our prior comments, submitted in response to the Agencies’ request for approaches to defining “waters of the United States,” 82 Fed. Reg. 34,899 (July 27, 2017), GPA Midstream suggested that “waters of the United States” conform to the Supreme Court’s decision in Rapanos v. United States, 547 U.S. 715 (2006), that the categories of “waters” be easily understood by the regulated community, and that the Agencies recognize the dominant role of States that Congress envisioned in the Clean Water Act. We are pleased to see the Agencies’ proposed definition of “waters of the United States” largely adheres to these principles. We believe the result is a definition that more faithfully hews to the Clean Water Act’s text and structure than prior definitions while staying within the boundaries set out by U.S. Supreme Court decisions interpreting the Act and Congress’ Commerce Clause power. As detailed in these comments, GPA Midstream urges the Agencies to finalize the proposed definition of “waters of the United States” under Step Two with only minor recommended changes.

**The Midstream Sector**

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” These midstream activities can be generally divided into five different functions, although many of GPA Midstream’s member companies fulfill multiple functions.

**Gathering.** Once a gas company drills a well and extracts natural gas, gathering lines transport that gas to a processing plant. Gathering lines, which make up a gathering system in an area of natural gas development, are a network of small-diameter, low pressure pipelines. GPA Midstream's members operate hundreds of thousands of miles of gathering lines. Without the installation of these gathering lines, a well must be shut-in or the gas flared.

**Processing.** Raw natural gas from wells must be processed to meet regulations and commercial pipeline standards. This removes water, hydrogen sulfide, and other non-methane hydrocarbons to produce pipeline quality "dry gas" that can be used as fuel. Valuable natural gas liquids ("NGLs") are among the materials removed through processing. These NGLs include natural gasoline, butane, iso-butane, propane, and ethane. GPA Midstream members account for more than 90 percent of all NGLs extracted from produced gas in the United States.

**Storage.** Processed natural gas may be stored in underground facilities until withdrawn during periods of peak demand, such as during the winter home heating season.

**Transportation.** Pipelines provide the safest method for transporting large quantities of processed natural gas significant distances. From gathering systems, to large transmission pipelines, to distribution pipeline systems, GPA Midstream's members use these pipelines to transport gas from the well head to homes and businesses.

**Marketing.** Midstream companies also market the natural gas and NGLs extracted through natural gas processing, matching available supplies with buyers.

The midstream industry supports the development of new gas wells, meaning that midstream infrastructure must keep pace with that development. Drill rigs can deploy rapidly to an area or change drilling schedules in response to well test results, requiring midstream companies to quickly follow with new gathering lines, processing plants, and compression stations. Typically, these projects can be designed, constructed, and begin operations in less than a year, with modular equipment deployed in even less time. However, Clean Water Act permitting – or even negotiations regarding the need for permits – can take far longer. Delays through slow permit processing, inconsistent or conflicting jurisdictional determinations, related changes to engineering and design, and regulatory uncertainty, including which agencies to involve, can cause excessive and unnecessary costs to project development and can even lead to the cancellation of vital infrastructure projects. This means that the midstream industry places a premium on regulatory certainty, simplicity, and speed. For these reasons, GPA Midstream believes that in defining "waters of the United States" under "Step Two," the Agencies should largely rely upon the comparatively simple, easy to understand rules laid out by the Rapanos plurality opinion.

### Summary

GPA Midstream commends the Agencies on their work to clarify the definition of "waters of the United States" so that it is easier to understand and apply, allows for consistency in its application, and has the potential to reduce the costs and burdens of jurisdictional determinations. The proposed definition is legally defensible in that it attempts to mark a clear line between federal and state jurisdictional waters and wetlands based on the Clean Water Act's text, the need to avoid serious constitutional questions regarding the scope of Congress' Commerce Clause power, and align with guidance provided by several Supreme Court decisions.

As explained in more detail below, GPA Midstream urges the Agencies to retain its general approach and structure of the proposed definition in a final rulemaking. As proposed, the rule would greatly clarify the extent of federal jurisdiction. Although no set of written guidelines can eliminate grey areas in all cases, the proposed rule is a significant improvement over the “significant nexus” test, which is subjective, confusing, and fails to impose any real limitations on federal jurisdiction. By creating a clearer dividing line between federal and state waters, the proposed rule implements the intent of Congress, recognizes the proper role of state regulation, and accords with Supreme Court precedent.

### The Proposed Rule Greatly Clarifies the Extent of Federal Jurisdiction

GPA Midstream cannot emphasize enough the necessity for regulated parties to understand for themselves the scope and limits of the Agencies’ Clean Water Act jurisdiction. The Clean Water Act prohibits discharges of pollutants into “navigable waters,” a term defined in the act to mean “the waters of the United States, including the territorial seas.” 33 U.S.C. §§ 1362(12), 1362(7). The Clean Water Act leaves it to the Agencies to define the term “waters of the United States,” which EPA and the Corps have done several times through regulations and guidance documents. The importance of the Agencies’ definition of “waters of the United States” cannot be overstated as it defines the extent of Clean Water Act regulation under several programs. These include the establishment of State water quality standards under Section 303(a); the establishment of total maximum daily loads for impaired waters under Section 303(d); the need to obtain National Pollutant Discharge Elimination System permits, including individual, general, and storm water permits, under Section 402; oil spill reporting requirements under Section 311; and wetlands dredge and fill permitting under Section 404. Thus, where the definition of “waters of the United States” lacks clarity then each of these regulatory programs lack clarity. Similarly, where ambiguities allow for inconsistent or expansive claims of jurisdiction, then each of these regulatory programs are subject to such inconsistencies and expansions in scope.

The need for a clear definition of “waters of the United States” that provides fair notice to the regulated community is underscored by the broad terms “pollutant” and “discharge of a pollutant” – which prohibit depositing materials, such as dirt or gravel, that few people would commonly think of as “pollutants” – and impose severe penalties, enforced under a strict liability scheme, for unlawfully discharging a pollutant. See 84 Fed. Reg. at 4,156-57 (acknowledging breadth of these terms). The Clean Water Act is frequently 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). The broad extent of Clean Water Act jurisdiction can ensnare the construction of virtually any project, including “lightly” regulated activities, as demonstrated in Sackett v. EPA, 132 S. Ct. 1367 (2012), where EPA demanded heavy civil penalties from a couple merely trying to build a home in an already developed residential neighborhood. Crafting a clear and straightforward definition of “waters of the United States” that can be understood without a cadre of consultants and lawyers allows small businesses and individuals to comply with their legal obligations. This is all the more important because the Clean Water Act carries civil penalties up to \$54,833 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). This is why GPA Midstream supports the Agencies’ proposed definition of “waters of the United States” as its components are based on the commonly understood meanings of key terms and phrases, helping to provide fair notice to those regulated by the Clean Water Act.

GPA Midstream further supports the proposed definition in that it better accords with common sense than the current definition of “waters of the United States” and the way in which agencies have interpreted that definition. By limiting the definition of a “tributary” to perennially or intermittently flowing water bodies, and significantly reducing the number of jurisdictional ditches, neither the Agencies nor the regulated community will have to expend nearly as much time and money on disputes over whether areas of dry land are “waters.” Similarly, limiting federal jurisdiction to only those wetlands that directly abut a jurisdictional water will avoid jurisdictional disputes over remote wetlands located miles from an “adjacent” jurisdictional water under the current definition. 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.S. 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’s, 633 F.3d 278, 282 (4th Cir. 2011) (jurisdiction established over wetlands through series of drains and ditches running three to four miles to a navigable-in-fact water); Robertson v. United States, No. 18-609, Petition for Writ of Certiorari at 8-9 (appealing criminal conviction for filling wetland roughly 40 miles from nearest navigable water). Clear, common sense rules for when federal jurisdiction does and does not apply will avoid needless costs and delays for regulated parties, as well as onerous enforcement actions against those who were otherwise undertaking routine construction or industrial activities.

#### The Agencies Correctly Propose to Reject the “Significant Nexus” Test

GPA Midstream commends the Agencies for finding common ground between the Rapanos plurality opinion and the opinion of Justice Kennedy. We agree that both opinions support some aspects of the proposed definition. See 84 Fed. Reg. at 4,168 (both opinions would find at least some seasonal and intermittent streams jurisdictional; both voiced significant concerns over the regulation of ditches or other more removed tributaries), 4,175 (“the proposed definition incorporates the important aspects of Justice Kennedy’s opinion.”). The Agencies are correct, however, in proposing to reject the “significant nexus” test in defining “waters of the United States.” Id. at 4,170. As noted in the opinion itself, Justice Kennedy’s “significant nexus” test was only intended for application “[a]bsent more specific regulations” by the Agencies. Rapanos, 547 U.S. at 782 (Kennedy, J., concurring). The Agencies are now proposing those regulations. Even without Justice Kennedy’s caveat, there are several reasons why the Agencies should decline to use the “significant nexus” test in defining “waters of the United States.”

First, Justice Kennedy’s opinion was not endorsed by any other Justice. This was largely because the “significant nexus” test was not informed by the text or structure of the Clean Water Act, 547 U.S. at 753 (plurality opinion), and appears to be largely premised upon Justice Kennedy’s personal understanding of hydrological concepts. Justice Kennedy never understood the “significant nexus” test to be required by the Clean Water Act’s or intended it to be codified into regulations. The “significant nexus” test was only a stopgap measure “to avoid unreasonable applications of the statute” due to “the potential overbreadth of the Corps’ regulations.” Id. at 782.

Second, Justice Kennedy’s “significant nexus” test not only lacks a conjunction with the Clean Water Act’s text, but is subjective and difficult to apply in actual cases. Even on its face, the “significant nexus” test seems designed to preclude regulatory certainty, as Justice Kennedy himself describes the test as requiring “the Corps” to “establish a significant nexus on a case-by-case basis....” 547 U.S. at 779. The uncertainty of a case-by-case analysis was exacerbated by the

2008 Guidance which defined a “significant nexus” as involving an open-ended list of amorphous considerations that included “flow characteristics and functions,” “hydrologic factors,” such as the “volume, duration, and frequency of flow,” “certain physical characteristics” of tributaries, proximity of features to traditional navigable waters, “ecological factors” that included the “potential of tributaries to carry pollutants and flood waters to traditional navigable waters,” and the “potential of wetlands to trap and filter pollutants or store flood waters.” Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States and Carabell v. United States (2008) at 8.

The lower courts’ adoption of the “significant nexus” test after Rapanos, was only due to the Supreme Court’s instructions in Marks v. United States, 430 U.S. 188, 193 (1977), requiring lower courts to interpret the Rapanos holding as the narrowest grounds between the plurality and the concurring opinion. The vagueness of the test, however, including whether it should be applied to both wetlands and tributaries, spawned considerable division in the lower courts. Compare Tri-Realty Co. v. Ursinus College, 124 F. Supp. 3d 418, 466 (E.D. Pa. 2015) (non-navigable creek deemed to be jurisdictional tributary due to “significant nexus” via groundwater to another non-navigable creek) with Benjamin v. Douglas, 673 F. Supp. 2d 1210, 1215 n. 2 (D. Or. 2009) (“Justice Kennedy’s significant nexus test is inapplicable to determining the jurisdictionality of tributaries to waters of the United States”); see also Resource Prot. Council v. Flambeau Min. Co., 903 F. Supp. 2d 690, 714 (W.D. Wis. 2012) (collecting cases showing conflicts in how the “significant nexus” test should be used).<sup>1</sup> Other courts have found the “significant nexus” unhelpful in determining Clean Water Act jurisdiction. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (“Because Justice Kennedy failed to elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in this circuit”); United States v. Robison, 521 F. Supp. 2d 1247, 1248 (N.D. Ala. 2007) (re-assigning case for re-trial, in part, because “I am so perplexed by the way the law applicable to this case has developed” after the Rapanos decision “that it would be inappropriate for me to try it again”). Despite over ten years of experience with the “significant nexus” test in lower courts, it fails to impose any intelligible limitations on Clean Water Act jurisdiction or inform regulated parties of their possible obligations under the Clean Water Act in advance.

Third, if anything, the “significant nexus” test often allows for an expansion of federal jurisdiction. See, e.g., Stillwater of Crown Point Homeowner’s Ass’n, Inc. v. Kovich, 820 F.Supp. 2d 859, 900 (N.D. Ind. 2011) (“the wetlands at issue are not themselves adjacent to the Little Calumet River but rather are adjacent to a tributary to a tributary ... [h]owever, given the reasoning of Justice Kennedy’s concurrence and the resulting ‘significant nexus’ test, the Court finds that that ... Smith Ditch and the wetlands at issue” are waters of the United States “as a matter of law”); Benjamin, 673 F. Supp. 2d 1210 (D. Or. 2009) (finding “significant nexus” between non-navigable

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<sup>1</sup> The Agencies’ view that Justice Kennedy only intended the “significant nexus” test to be applied to wetlands, and not tributaries, 84 Fed. Reg. at 4,175, is correct. Justice Kennedy’s opinion only discussed the “significant nexus” test with respect to the relationship between a wetland and a navigable water or tributary to a navigable water. 547 U.S. at 766-67, 782-83. With respect to tributaries, Justice Kennedy criticized the Corps’ definition of “tributary” as overbroad. “Yet the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role of an aquatic system comprising navigable waters as traditionally understood.” 547 U.S. at 781. Justice Kennedy did not explicitly propose any definition of “tributary” or intimate that any type of flowing water must be jurisdictional based on a “significant nexus” to tributaries or navigable-in-fact waters.

tributary and wetland in part because they both flooded a rifle range); United States v. Fabian, 522 F. Supp. 2d 1078 (N.D. Ind. 2007) (finding “significant nexus” because land was adjacent to a “navigable river” containing as little as nine-inches of water despite separation by a 15-foot high and 130-foot wide levee); see also Rapanos, 547 U.S. at 728 (“And even the most insubstantial hydrologic connection may be held to constitute a ‘significant nexus.’”). In fact, experience shows that the “significant nexus” test is overly subjective in that experienced professionals can consider the exact same data and come to contradictory opinions. Thus, the “significant nexus” test does not, as a practical matter, provide courts or the Agencies with any means to draw lines between waters under federal jurisdiction and state jurisdiction.

Further, one consequence of the “significant nexus” test is that courts are now finding Clean Water Act jurisdiction over groundwater so long as a plaintiff can assert a plausible “hydrological connection” to any jurisdictional water. Previously, two of the three U.S. Courts of Appeals to consider the issue rejected the notion of Clean Water Act jurisdiction over “discharges” to groundwater. D.E. Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001); Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994); but see Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (isolated arroyos were jurisdictional due to filtration to aquifer which eventually flowed underground towards a spring and a river). The “significant nexus” test, however, has caused some courts to tack in the opposite direction, effectively asserting Clean Water Act jurisdiction over groundwater pollution. See, e.g., N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000-1001 (9th Cir. 2007) (finding “significant nexus” in part because waste treatment pond “drains into the aquifer” and groundwater “reaches the River” though a hydrological connection); Tri-Realty Co. v. Ursinus College, 124 F. Supp. 3d 418, 466-67 (E.D. Pa. 2015) (one non-navigable creek deemed to be a tributary of another non-navigable creek despite the absence of any surface connection between them due to potential movement of groundwater); Yadkin Riverkeeper v. Duke Energy Carolinas, 141 F. Supp. 3d 428 (M.D.N.C. 2015) (finding “hydrologic connection” between waste treatment pond and navigable water via groundwater); Hawaii Wildlife Fund v. County of Maui, 24 F. Supp. 3d 980 (D. Hawaii 2014), aff’d, 886 F. 3d 737 (9th Cir. 2018), cert. granted, 2019 WL 659786 (2019) (finding discharges from underground injection well regulated under Safe Drinking Water Act jurisdictional due to groundwater connection to ocean). Instead of allowing parties and courts to distinguish between federal waters and state waters, the “significant nexus” test has enabled a further expansion of federal authority over groundwater, which has traditionally been regulated under state laws.<sup>2</sup>

Due to all of these defects, the Agencies should understand that Justice Kennedy’s “significant nexus” test was a judicially-created makeshift to constrain overly broad assertions of Clean Water Act jurisdiction that was not intended to be permanent and has proven to be unworkable in practice. As explained by the plurality, the term “significant nexus” was created by the Court itself; it does not derive from the Clean Water Act and the Agencies are not bound to use it. See Rapanos, 547 U.S. at 755 (“that phrase appears nowhere in the Act, but is taken from SWANCC’s cryptic characterization of the holding in Riverside Bayview.”). The ten year old “significant nexus” test has increased costs and delays, increased uncertainty, and dramatically

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<sup>2</sup> The proposed rule would exclude groundwater from federal jurisdiction. 84 Fed. Reg. at 4,190. As the proposed rule noted, this is not a change from the Agencies’ current and historic interpretation, as they “have never interpreted ‘waters of the United States’ to include groundwater....” Id. Several courts, however, have concluded that the “significant nexus” test compels a contrary conclusion.

expanded federal jurisdiction over all manner of lands, dry concrete ditches, drains, and other features that are properly left to State and local regulation.

### The Proposed Definition of “Waters of the United States” is Consistent with the Limitations on Congress and the Agencies

The Clean Water Act is based on Congress’ “commerce power over navigation.” Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159, 168, n.3 (2001). Before Congress passed the Clean Water Act, the “navigable waters of the United States” was well understood to mean those interstate waters “navigable in fact” or susceptible to being made navigable. The Daniel Ball, 10 Wall. 557, 563 (1871). The Supreme Court arguably established the outer limits of Congress’ authority over navigation under the Commerce Clause in Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 523 (1941). There, the Court held that “Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions.” See also Utah v. United States, 403 U.S. 9, 11 (1971) (Congress can regulate waterways that are “part of a channel of interstate commerce, even if they are not themselves navigable or do not cross state boundaries.”).

This principle guided the Corps’ initial definition of “navigable waters” under the Clean Water Act. 39 Fed. Reg. 12,119 (April 3, 1974). In a challenge to those regulations, a district court judge declared, without explanation in a one page order, that Congress intended the term “the waters of the United States” to assert “federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution” and invalidated the Corps’ definition. Natural Resources Defense Council, Inc. v. Callaway, 392 F.Supp. 685, 686 (D.D.C. 1975). The Corps did not appeal the decision, opting instead to adopt more expansive regulations.

The Callaway decision, and the Agencies’ interpretation of Clean Water Act jurisdiction that followed, have strayed far from the source of Congress’ authority – “commerce power over navigation.” To assert federal jurisdiction “to the maximum extent permissible under the Commerce Clause of the Constitution,” as Callaway envisioned, ignores the maxim that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” SWANCC, 531 U.S. at 172. Congress, of course, has provided no such clear statement in the Clean Water Act. To the contrary, Congress expressly reserved traditional state authority over the development and use of land and water resources, substantially limiting the full exercise of Commerce Clause authority.

Like a sliding scale, however, the further the Agencies push the boundaries of federal jurisdiction, the more they impinge on both the Clean Water Act’s reservation of powers for the States and the limitations of Congress’ power over navigation. Both the “significant nexus” test and the 2015 Rule are untethered from the Clean Water Act’s statutory authorization and any notions of navigability. See, e.g., Rapanos, 547 U.S. at 756 (“significant nexus” test “rewrites the statute” to provide “Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that ‘significantly affect the chemical, physical, and biological integrity of’ waters of the United States” even though Congress did not provide jurisdiction on that basis); Georgia v. Pruitt, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018) (enjoining 2015 Rule because it would assert jurisdiction over waters and lands based on “a significant ‘biological effect’ such as aquatic habitats”). Alternate approaches to defining “waters of the United States” based on, for instance, various scientific concepts of connectivity will suffer from similar defects in that they lack any relationship to

navigation. The 2015 Rule expanded federal jurisdiction by “cover[ing] those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas,” 80 Fed. Reg. 37,054, 37,055 (June 29, 2015) (emphasis added), allowing for federal jurisdiction where any of these three factors were met and without regard to considerations of interstate commerce or navigability. As noted in the Rapanos plurality opinion, Congress did not authorize the Agencies to consider evolving scientific understandings in defining “waters of the United States.” The question of federal jurisdiction is a legal one turning solely on the Clean Water Act’s text and Congress’ power over navigability, *i.e.*, a “line-drawing” determination “based primarily on [the Agencies’] interpretation of the language, structure, and legislative history of the statute and the policy choices of the executive branch agencies.” 84 Fed. Reg. at 4,169.

GPA Midstream appreciates the Agencies’ explicit acknowledgement that they are changing their regulatory interpretation of the Clean Water Act. 84 Fed. Reg. at 4,169 (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)). And we believe the Agencies have articulated good reasons for the change grounded in the language of the Clean Water Act and the limits of Congress’s commerce power. *Id.* The Agencies’ new interpretation keeps closer to the Clean Water Act’s statutory text and avoids raising constitutional questions regarding the limits of Congress’ authority over interstate commerce and navigation and the role of the States in regulating land and water use. GPA Midstream agrees that both the need to reconsider the definition of “waters of the United States,” and the definition proposed, are reasonable “especially in light of the long history of controversy and confusion over this definition.” 84 Fed. Reg. at 4,169.

#### The Clean Water Act Leaves States Free to Make Their Own Regulatory Decisions

GPA Midstream is happy to see the Agencies emphasize the proper role that Congress recognized for states. The Clean Water Act provides that “It is the policy of 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 (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. § 1251(b); 84 Fed. Reg. at 4,163. Congress did not, in either the Clean Water Act’s text or its legislative history, intend that States to be relegated to managing whatever few water bodies that may have escaped broad federal jurisdiction. Rather, Congress contemplated that the states play an important role in the regulation of waters within their borders. As the Rapanos plurality noted, “[r]egulation of land use, as through the issuance of the development permits sought by petitioners ... is a quintessential state and local power” and the Agencies should not act “as a de facto regulator of immense stretches of intrastate land” akin to “a local zoning board.” 547 U.S. at 738.

Of course, avoiding an excessively broad definition of “waters of the United States” will not leave development and industrial activities unregulated. Many State and municipal agencies already regulate state jurisdictional streams and wetlands to varying degrees. These agencies are often better at understanding their State’s waterways and attendant ecological functions. Further, States and municipalities are also better suited to determine how State jurisdictional waters and wetlands will be regulated depending upon their particular circumstances.

To the extent that some commenters assert that State and municipal water pollution regulations are underdeveloped, this is neither surprising nor permanent. As the Rapanos plurality



noted, the Agencies' historically broad view of federal jurisdiction has crowded out State and local regulation of lands and waters.

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute ... In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States – including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit – whether man-made or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated 'waters of the United States' include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years.

547 U.S. at 722. Notably, this was written before the Agencies and lower courts expanded Clean Water Act jurisdiction even further with the 2015 Rule and "significant nexus" test, respectively. Historic expansion of federal jurisdiction likely crowded out robust State regulatory programs because States would neither see a need for duplicative regulations nor necessarily have the resources to enforce them. Finalizing the proposed rule will give States the ability to examine whether their own regulations require any alteration in response. For instance, the California Water Resources Control Board is already implementing [a new definition and delineation procedure](#) for state jurisdictional wetlands in response to the Agencies' proposed rule.

However, the degree to which States currently regulate waters and wetlands, or may regulate them in the future, is not a factor the Agencies may consider in defining "waters of the United States." The extent of federal jurisdiction is driven solely by the text of the Clean Water Act and guidance by the Supreme Court. In the absence of federal jurisdiction, States may choose to regulate waters and wetlands differently than the Agencies, and it has been the experience of at least some GPA Midstream members that some State regulations are more stringent than under the federal program. However States choose to regulate state jurisdiction waters, or may regulate them in the future, these are issues to be contemplated by State legislatures, not the Agencies in defining "waters of the United States."

#### The Agencies Should Provide for an Appropriate Transition for Those Waters and Wetlands that Become State Jurisdictional

Although it is difficult to quantify the number of waters and wetlands that the Rule would move from federal jurisdiction to State jurisdiction, there will be an initial transition period where both the Agencies and the States must evaluate the jurisdiction of specific waters and wetlands and take appropriate action on permits, permit applications, and jurisdictional determinations. During the Agencies' outreach in anticipation of the Proposed Rule, several State and local agencies noted that there are likely to be staffing and resource constraints that could

result in permitting delays, backlogs, and uncertainty with respect to the status of certain projects. *See* Summary Report on Federalism Consultation: Revised Definition of ‘Waters of the United States’ Proposed Rule, EPA-HQ-OW-2018-0149-0088. This is especially the case where state general permits may not be available or widely used, or in states that have traditionally relied on the federal Agencies to implement many of the programs affected by this rulemaking. Accordingly, GPA Midstream requests that the Agencies address this concern in the final rule.

Specifically, GPA Midstream strongly encourages the Agencies to work with States while the States work through the appropriate rulemakings needed to transition certain projects from federal regulation to State regulation. This may include the development of State general permits or State regulations “grandfathering” federal permits for projects that will fall under State jurisdiction after the Agencies finalize the Proposed Rule. To aid State agencies in preparing for a re-evaluation and potential expansion of State jurisdiction, GPA Midstream urges the Agencies to delay the final rule’s effective date to 18 months after publication. This will afford some measure of certainty for projects that are covered by existing permits and pending permit applications (many of which are submitted far in advance of pipeline construction, which necessarily requires appropriate long-term project planning). This transition period will ensure that States have the necessary time to pass the necessary rulemaking and make the necessary staffing adjustments before engaging in new regulation of waters previously under federal jurisdictional.

GPA Midstream also notes that the Section 404 preliminary jurisdictional determination (“Preliminary JD”) process will be especially important to infrastructure development during the transition period as States develop the regulations and staffing that may be required when the Proposed Rule is finalized. Preliminary JDs offer several benefits for both project proponents and regulatory agencies and ensure the expeditious processing of Section 404 permits. When the Corps issues a Preliminary JD or “authorizes an activity through a general or individual permit relying on an issued Preliminary JD,” it makes “no legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question.” Corps Regulatory Guidance Letter No. 16-01, at \*3 (Oct. 2016) (hereinafter “RGL 16-01”). A project proponent may request a Preliminary JD “to move ahead expeditiously to obtain a Corps permit authorization where the requestor determines that it is in his or her best interest to do so” and “may be requested even where initial indications are that the aquatic resources on a parcel may not be jurisdictional.” *Id.* “A permit decision made on the basis of a [Preliminary] JD will treat all aquatic resources that would be affected in any way by the permitted activity on the parcel as jurisdictional” because a Preliminary JD allows for a delineation of affected wetlands and other waters “without determining the jurisdictional status of such aquatic resources.” *Id.* In addition, the process allows for letters of permission and Corps verification of general permits and issuance of individual permits even where jurisdictional questions may not arise. *Id.* GPA Midstream urges the Agencies to acknowledge that the Preliminary JD process will still be available after the Proposed Rule is finalized and that infrastructure project developers should be encouraged to seek a Preliminary JD during the transition period.

#### The Proposed Definition of “Tributaries” is Improved Over the 2015 Rule

The Agencies’ proposed definition of “tributaries” is greatly improved over the 2015 Rule in terms of clarity and faithfulness to both the Clean Water Act’s text and U.S. Supreme Court cases interpreting the Act. The proposed definition generally excludes those features that the

Rapanos plurality found to be outside the scope of the Clean Water Act, such as dry washes, arroyos, and other ephemeral water features. See 547 U.S. at 725 (criticizing regulation of arroyos, arid sites, and other waters flowing only after rainfall). GPA Midstream supports a definition of “tributary” where relatively consistent flow, even if seasonal or intermittent, is the determining factor. We recognize that, although there can be some dispute in certain instances regarding whether a feature contains flow enough to constitute an “intermittent” tributary, these will be a small minority of cases. GPA Midstream sees no reason to impose a minimum number of days of flow to define an “intermittent” stream. The overall proposed definition provides greater clarity than under the 2015 Rule.

GPA Midstream believes that the definition of a “tributary” should not consider the sole or primary source of the water. A feature’s source of water, be it melting snowpack or groundwater, is not relevant under the Clean Water Act and cannot be easily discerned from observation. Although a landowner may understand that an intermittent stream running through their property gains from snowpack or is a “gaining” stream from groundwater, the definition of “tributary” should not require regulated parties to engage consultants to confirm or investigate the source of the water as this is not relevant to the consistency of stream flow or whether the stream flows to a navigable water.

GPA Midstream does have concerns with the Agencies’ use, and definition of, “typical year” in determining whether a stream may be intermittent versus ephemeral. The process proposed by the Agencies, which involves analyzing local rainfall data and determining whether precipitation falls within the 30th and 70th percentiles of average rainfall over a 30-year rolling period, as determined by NOAA weather stations, is simply too complex for most landowners and will almost certainly require the use of outside consultants. This analysis also constitutes a relatively complex case-by-case determination, which the Agencies have expressed a desire to avoid through their use of categorical determinations for jurisdictional waters. Further, rainfall data may not be reflective of the feature at issue, whose flow will also be influenced by elevation changes, individual surface features, and whether it is a losing or a gaining stream. GPA Midstream believes that this is too cumbersome and prone to inconsistent determinations. Rather the determination should be based on relatively available sound science.

#### The Proposed Definition of “Adjacent Wetlands” Accords with Supreme Court Precedent

GPA Midstream supports the proposed rule’s limitation of jurisdictional wetlands as those “adjacent” to other jurisdictional waters. 84 Fed. Reg. at 4,184. However, GPA Midstream requests that the Agencies provide additional specificity with respect to the definition of “adjacent wetlands.” As proposed, “adjacent wetlands” are those “that abut or have a direct hydrological surface connection to other” jurisdictional waters. Id. It is not clear how the Agencies will interpret the term “direct hydrological surface connection.” Should the Agencies interpret this term to assert jurisdiction over features such as ephemeral creeks or road side ditches, then much of the proposed rule’s purpose will be frustrated. The Agencies should clarify that the term “direct hydrological surface connection” will not include ephemeral features or road side ditches that travel between wetlands and other jurisdictional waters.

GPA Midstream supports the Agencies interpretation that Clean Water Act jurisdiction over “adjacent wetlands” can be broken “by upland or by dikes, barriers, or similar structures” that prevent “a direct hydrologic surface connection to jurisdictional waters.” Id.; see

also *id.* at 4,187 (citing dictionary definition as including those that “abut,” or are “next to,” “adjoining,” or “touch at least at one point or side of”). This conforms to United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985), which arguably established the regulation of wetlands “adjacent to a navigable waterway” as the outer limits of the Clean Water Act’s authority over non-navigable waters. The Riverside Bayview Court conditioned its interpretation of the Act on wetlands being in the gray area where “water ends and land begins;” the “shallows, marshes, mudflats, swamps, bogs ... that are not wholly aquatic but nevertheless fall far short of being dry land.” *Id.* at 132. In other words, the regulation of wetlands is only permissible when it is objectively difficult to determine where a “water” ends. See Rapanos, 547 U.S. at 740 (“The difficulty of delineating the boundary between water and land was central to our reasoning in” Riverside Bayview); see also SWANCC, 531 U.S. at 168 (Clean Water Act does not permit regulation of “ponds that are not adjacent to open water”); Rapanos, 547 U.S. at 742 (“only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”).

GPA Midstream also supports physical barriers between wetlands and jurisdictional waters cutting off federal jurisdiction where there is no direct hydrological surface connection to jurisdictional waters. 84 Fed. Reg. at 4,186 (“wetlands separated from other jurisdictional waters by uplands or by dikes, barriers, or other similar structures are not adjacent simply because a surface water connection between the two is possible” during rainfall or flooding). This not only imposes a clear, observable break between federal and state jurisdiction, but it accords with Riverside Bayview’s holding that regulating wetlands is only permissible when it is unclear where “water ends and land begins.” 474 U.S. at 132. We agree that a “mere hydrological connection between a nonnavigable, isolated, intrastate wetland and a jurisdictional water,” 84 Fed. Reg. at 4,188, despite a physical surface barrier, fails to meet the criteria established in Riverside Bayview, which requires a surface connection between the wetland and jurisdictional water. GPA Midstream opposes establishing any “distance limit” that would include wetlands that do not abut a jurisdictional water, 84 Fed. Reg. at 4,189, as this goes beyond what Riverside Bayview permits. There, the Court held that the regulation of wetlands was permissible only when they are indistinguishable from adjacent waters. 474 U.S. at 132. Allowing some distance of dry land, or other discernible barrier, between a wetland and jurisdictional waters would not be permitted under Riverside Bayview.

### Conclusion

GPA Midstream believes that a simplified and easier to understand definition of “waters of the United States” is more in-line with the intent of Congress and U.S. Supreme Court precedent than under current law and, therefore, legally defensible. 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,



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