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Via Regulations.gov

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

Re: Comments in Response to Supplemental Notice of Proposed Rulemaking, Definition of 'Waters of the United States' – Recodification of Preexisting Rule, Docket EPA-HQ-OW-2017-0203

Dear Sir or Madam,

The GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments in response to the supplemental notice of proposed rulemaking by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (collectively, "the Agencies") to revise the Clean Water Act regulations defining "waters of the United States." 83 Fed. Reg. 32,227 (July 12, 2018).

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." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs. GPA Midstream is the primary advocate for a sustainable midstream industry focused on enhancing the viability of natural gas, natural gas liquids and crude oil.

Introduction

GPA Midstream strongly supports the Agencies' proposal to rescind the 2015 Rule Defining Waters of the United States ("2015 Rule") and restore the 1986 version of the crucial Clean Water Act term. 82 Fed. Reg. 34,899 (July 27, 2017). Importantly, the Agencies have acknowledged that rescinding the 2015 Rule is only "Step One" in defining "waters of the United States" and that the Agencies must also complete "Step Two" by promulgating a new definition to guide landowners across the country. GPA Midstream supports the Agencies' two step approach, including the intention to propose a new definition that conforms to the plurality opinion of the Supreme Court's decision in Rapanos v. United States, 547 U.S. 715 (2006).

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GPA Midstream provides these comments in response to the supplemental notice of proposed rulemaking to rescind the 2015 Rule, which largely discusses the legal history of the term "waters of the United States" under the Clean Water Act and the legal bases for the 2015 Rule. As discussed in more detail below, GPA Midstream maintains that the 2015 Rule had significant legal flaws in that it was purportedly based on the opinion of a single Supreme Court Justice. Further, even if it was appropriate to build a complex regulatory definition upon such an opinion, the 2015 Rule misquoted and ignored key aspects of Justice Kennedy's concurring opinion in Rapanos in order to dramatically expand federal jurisdiction beyond the Clean Water Act's statutory limitations. Specifically, the 2015 Rule neglected the statutory prerequisite that federal jurisdiction be connected to "navigability." Further, the 2015 Rule raised serious Constitutional questions by ignoring the traditional role of States in regulating waters, wetlands, and lands and contradicting Congress' express preservation of this role.

I. The 2015 Rule Should Not Have Relied on Justice Kennedy's Concurring Opinion in Rapanos

The 2015 Rule purported to follow Justice Kennedy's concurring opinion in Rapanos v. United States, 547 U.S. 715 (2006). See 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (stating that the 2015 Rule would be based on the "significant nexus" discussion in Justice Kennedy's concurring opinion); id. at 37,058 (relying on Justice Kennedy's concurring opinion as justification for defining jurisdictional waters); id. at 37,059 (same). As a result, the Agencies claimed to take as their guide the opinion of a single Justice. The Agencies should have treated this concurring opinion narrowly in that Justice Kennedy agreed with the outcome in Rapanos and its companion case, Carabell v. U.S. Army Corps of Engineers, but nothing more. Instead, the 2015 Rule centered on a purported "significant nexus" requirement recognized by a lone Justice's concurring opinion that no other Justice joined. See Rapanos, 547 U.S. at 767 (Kennedy, J., concurring) ("neither the plurality nor the dissent addresses the nexus requirement…."). This alone was an improper legal basis for a rulemaking.

Even setting that aside, the substance of Justice Kennedy's concurring opinion was a poor template for a detailed regulatory scheme. To define the extent of Clean Water Act jurisdiction, Justice Kennedy relied extensively on a series of vague terms that are not found in the Clean Water Act itself. For instance, Justice Kennedy's opinion embraced the term "significant nexus" – a rhetorical characterization from a prior Supreme Court discussing a third Supreme Court case – and mistakenly elevated it to the sine qua non of Clean Water Act jurisdiction. See Rapanos, 547 U.S. at 759 (Kennedy, J., concurring) (quoting Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engs. ("SWANCC"), 531 U.S. 159, 167-68 (2001) (discussing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)). The plurality's harsh criticisms of Justice Kennedy's opinion for emphasizing and misusing the obscure phrase "significant nexus" should have warned the Agencies away from incorporating the term into a rulemaking. See 547 U.S. at 753-57. However, the vagueness and impracticability of a "significant nexus" standard should have disqualified it from use in regulations.

The "significant nexus" evaluation is the centerpiece of Justice Kennedy's concurring opinion. According to that opinion, a "significant nexus" must be assessed in accordance with Congress' statement of purpose found in 33 U.S.C. § 1251(a). 547 U.S. at 779. Yet, nothing in that statement, or any other within the Clean Water Act, provides any guidance as to what a "significant nexus" should mean. This is simply because Congress never defined "navigable

waters" or "waters of the United States" in this way. Justice Kennedy chose to fill this void himself by suggesting that wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Id. at 780. Only those wetlands that have a "speculative or insubstantial" effect on water quality would, in Justice Kennedy's opinion, not be "navigable waters." Id. This definition – drawn from neither statute nor regulation – is rife with vague, undefined, and confusing terms: significant nexus, similarly situated lands, region, significantly affect, integrity, speculative and insubstantial. None of these relative descriptors provides any actual guidance to either regulators or regulated industry in the case-by-case analyses that Justice Kennedy desired. More importantly, there is no evidence that Congress ever intended for "navigable waters" to be defined by these phrases.

As GPA Midstream explained in its November 11, 2017 comments (attached), the "significant nexus" test has introduced unnecessary subjectivity and uncertainty in the regulation of private property, requiring the unnecessary expenditure of significant resources just to determine whether a property owner is subject to federal jurisdiction. GPA Midstream Comments, EPA-HQ-OW-2017-0480-0449 (Nov. 11, 2017) at 9-10 (discussing confusion among lower courts created by the "significant nexus" test); id. at 11-12 (discussing the need to expend significant time and costs even when there is ultimately no federal jurisdiction). Individual land owners and small and mid-sized companies cannot afford to spend hundreds of thousands of dollars to hire consultants and lawyers to debate whether their property has a "significant nexus" with some distant water, the scope of "similarly situated lands," what "region" the owners' property and various wetlands or waters may or may not be a part of, and whether that property "significantly affects" (or has some less than significant affect) on the "integrity" of a water body that may be miles away. The concurring opinion's emphasis on these vague comparative terms only highlights the need for practical simplicity in how the Agencies define "waters of the United States" so that regulated entities can easily determine whether or not they must comply with the Clean Water Act. See GPA Midstream Comments at 10-12.

II. The 2015 Rule Misread Justice Kennedy's Concurring Opinion

Even if Justice Kennedy's concurring opinion could provide a proper basis for the 2015 Rule, the Agencies dramatically expanded Clean Water Act jurisdiction by ignoring key limits the opinion staked out. Most importantly, Justice Kennedy's "significant nexus" test only applied to wetlands, not all waters. The 2015 Rule significantly misstates Justice Kennedy's concurring opinion, by asserting that "[u]nder the significant nexus standard, waters possess the requisite significant nexus if they 'either alone or in combination with similar situated [wet]lands in the region, significantly affect the chemical, physical or biological integrity of other covered waters…." 80 Fed. Reg. at 37,065 (quoting 547 U.S. at 780) (alteration in original) (emphasis added). Justice Kennedy's concurring opinion actually states that "wetlands possess the requisite nexus … if the wetlands, either alone or in combination with similarly situated lands in the region, significant affect the chemical, physical, and biological integrity of other covered waters…." 547 U.S. at 780 (emphasis added). This improper substitution of "waters" for "wetlands" worked a dramatic expansion of the Clean Water Act by significantly altering the test within the concurring opinion that purportedly justified the 2015 Rule. This expansion included the 2015 Rule's creation of six categories of "jurisdiction by rule" waters deemed to be jurisdictional "if they have a 'significant nexus' to a water that is jurisdictional." 83 Fed. Reg. at

32,229. As a result, the 2015 Rule swept in a number of types of waters that are contrary to both Justice Kennedy's concurring opinion but the outcome in Rapanos and the Supreme Court majority opinion in SWANCC.

Another key misreading of Justice Kennedy's opinion is the substitution of a "scientific" definition of "significant nexus" for the legal definition that Justice Kennedy's concurring opinion attempted to supply. In his opinion, Justice Kennedy stated that the "required nexus must be assessed in terms of the statute's goals and purposes" and continued on to discuss aspects of 33 U.S.C. §§ 1251(a), 1311(a), and 1362(12). The 2015 Rule hollowed out the concurring opinion's reference to the Clean Water Act and replaced it with non-legal assertions of how virtually all waters and wetlands are interrelated. 80 Fed. Reg. at 37,065-68. As a result, the 2015 Rule is based on extended discussions of alleged biological effects on downstream waters, drainage basins, sediment storage, food webs, and the like, id., not on the legal criteria specified in the Clean Water Act. See Scientific Advisory Board, Review of the EPA Water Body Connectivity Report (Oct. 17, 2014) at 2 (the "Connectivity Report" used to support the 2015 Rule "is a science, not policy, document" and is not intended to meet a legal definition). As the Agencies have noted, the result of pursuing a "scientific" definition of "significant nexus" would establish jurisdiction over waters previously deemed to be beyond the scope of the Clean Water Act. 83 Fed. Reg. at 32,242 (depressions at issue in SWANCC determined to be non-jurisdictional would be subject to federal jurisdiction under the 2015 Rule).

This disconnect between the 2015 Rule and the SWANCC decision is the starkest evidence of how the Agencies misread Justice Kennedy's concurring opinion. Justice Kennedy's opinion re-affirmed the outcome in the SWANCC, 547 U.S. at 776, and sided with the plurality because there was no evidence of a "significant nexus" in either the Rapanos or the Carabell cases. Rapanos, 547 U.S. at 783-87. Yet, the 2015 Rule would impose different outcomes in all three cases. The Agencies cannot rationally justify a complex jurisdictional regulation on a single concurring opinion where that regulation consistently contradicts that concurring opinion on questions of jurisdiction.

III. The 2015 Rule Ignored Navigability

The Clean Water Act prohibits discharges of pollutants into "navigable waters," 33 U.S.C. § 1362(12), a term defined in the Act to mean the "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The "waters of the United States" are a subset of "navigable waters," which the U.S. Supreme Court has defined as those waters "navigable in fact" or able to be made navigable in fact. The Daniel Ball, 10 Wall, 557, 563 (1871). In Riverside Bayview, the Supreme Court held that Congress "evidently intended" to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term" but repudiated the idea that Congress wanted to abandon the concept of navigability altogether. 474 U.S. at 133. Even Justice Kennedy's concurring opinion noted the centrality of "navigability" to Clean Water Act jurisdiction. Rapanos, 547 U.S. at 778 ("the dissent reads a central requirement out – namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance.").

The 2015 Rule, however, misstated Supreme Court precedent on this issue, including Justice Kennedy's concurring opinion, by summarily dismissing navigability as having any relevance to Clean Water Act jurisdiction: "the Supreme Court has consistently agreed that the

geographic scope of the CWA reaches beyond waters that are navigable in fact." 80 Fed. Reg. at 37,055. Instead of implementing a jurisdictional interpretation that has at least some anchor in the text of the Clean Water Act, the 2015 Final Rule imposed a "protection" standard, "interpret[ing] the CWA to cover 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." Id. This standard was implemented through nine enumerated ecological functions derived from the "Connectivity Report" that only further distances the 2015 Rule from the Clean Water Act's "navigability" requirement. It was the 2015 Rule's disregard for navigability that resulted in three courts enjoining operation of the rule. See 83 Fed. Reg. at 32,238 (discussing successful motions for preliminary injunctions against the 2015 Rule). Thus, the 2015 Rule's failure to honor the Clean Water Act's controlling "navigable" language makes it indistinguishable from the flaws identified in SWANCC.

IV. The 2015 Rule Encroaches on State Regulatory Authority, Raising Serious Constitutional Questions and Presuming Benefits that May Not Exist

States have long had regulatory authority over the lands, waters, and wetlands within their jurisdictional boundaries. Congress recognized this pre-existing State authority when it declared that its policy under the Clean Water Act was "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). The 2015 Rule dramatically expanded federal regulatory jurisdiction over waters, wetlands, and lands, with some States more effected than others. See 83 Fed. Reg. at 32,246-47 (discussing estimates that the 2015 Rule more than doubled the number of stream miles subject to federal jurisdiction with States such as Arizona, Arkansas, and Wyoming seeing increases in the number of federal jurisdictional streams ranging from 54.5% to 66.3%). For practical purposes, the regulation of waters, wetlands, and lands is a zero sum game; what is regulated by the Agencies cannot be regulated by State regulatory agencies (e.g., a State agency cannot authorize construction on an area subject to federal regulation).

The 2015 Rule raised a significant Constitutional concern as its diminution of traditional State regulatory powers should not have been imposed without a clear and plain statement from Congress. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); see also Gregory v. Ashcroft, 401 U.S. 452, 461 (1998) ("The plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."). In this instance, the Clean Water Act not only lacks such a clear or plain statement authorizing the 2015 Rule to shift the balance between federal and State regulatory power, but 33 U.S.C. § 1251(b) clearly disclaims such an authorization. According to Congress, it is the States, not the Agencies, that have "primary responsibilities and rights" to "prevent, reduce, and eliminate pollution" under the Clean Water Act and "to plan the development and use … of land and water resources…." Id. The Agencies failed to even explore this need for a clear and plain statement when drafting the 2015 Rule because, at the time, they denied that the 2015 Rule had any significant effect on federal jurisdiction. 80 Fed. Reg. at

37,054 ("State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule."); id. (the "scope of jurisdiction in this rule is narrower than that under the existing regulation"); id. at 37,101 (federal jurisdiction under the 2015 Rule would only result "in an estimated increase between 2.84 and 4.65 percent in positive jurisdictional determinations annually"). The Agencies, after undertaking an analysis of how the 2015 Rule would expand federal jurisdiction, now recognize that the prior assumptions were not accurate. 83 Fed. Reg. at 32,242-48. Now that the Agencies have information demonstrating the significant shift in federal-State regulatory authority, they must confront the "clear statement" test. Since the Clean Water Act explicitly disclaims the shift in federal-State regulatory jurisdiction imposed by the 2015 Rule, it lacks a statutory basis and exceeds the Agencies' authority

This reservation of State responsibilities and rights raises a second constitutional issue that is frequently glossed over. It is often repeated that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975); see, e.g., United States v. Ciampitti, 583 F. Supp. 483, 492 (D. N.J. 1984) (citing cases).[1] Indeed, this notion was relied upon by the Agencies in promulgating the 2015 Rule. See 80 Fed. Reg. at 37,084 (citing past regulations " reflect[ing] the agencies' interpretation at the time of the jurisdiction of the CWA to extend to the maximum extent permissible under the Commerce Clause of the Constitution" to deny that the 2015 Rule represented an expansion of federal jurisdiction). The reservation of State responsibilities and rights in § 1251(b), however, shows that this shibboleth cannot possibly be true. Had Congress truly sought to exert federal jurisdiction over waters "to the maximum extent permissible under the Commerce Clause," then preempting all State laws related to waters, wetlands, and any related lands would be just the first step. Congress would have gone further by patterning the Clean Water Act after the Agricultural Adjustment Act of 1938, regulating and prohibiting all "'intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.'" Wickard v. Filburn, 317 U.S. 111, 124 (1942) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)). However, instead exerting federal authority over waters "to the maximum extent permissible," Congress expressly declared that the Agencies do not even have "primary" authority in this area. The Agencies should follow Congress' lead by repudiating the notion that they must define "waters of the United States" "to the maximum extent permissible under the Commerce Clause of the Constitution."

The 2015 Rule compounds its error by ignoring existing State regulations entirely when analyzing the asserted benefits of the regulation. The Agencies' economic analysis of the 2015 Rule concluded that, depending upon various scenarios, the 2015 Rule would create between $339 million and $572 million in annual benefits. 80 Fed. Reg. at 37,101 (summarizing findings of Economic Analysis of EPA-Army Clean Water Rule (May 20, 2015) ("2015 Economic

[1] As GPA Midstream previously noted, the court in Natural Resources Defense Council, Inc. v. Callaway issued its "maximum extent permissible" language in a one page order without any analysis or explanation. GPA Midstream Comments at 3. Although the existence of this case was acknowledged in Rapanos' review of the Clean Water Act's regulatory history, 547 U.S. at 724, the Supreme Court has never adopted Callaway's enigmatic and unsupported conclusion.

Analysis")). However, the 2015 Economic Analysis' calculation of benefits contains a fatal flaw in that it presumes that all waters and wetlands that would come under federal regulation were previously unregulated by any governmental entity. This presumption is belied by existing State and local regulations over non-federal waters and wetlands. Certainly, the value of these state and local regulations may vary, depending upon the scope and nature of the state's regulation. The only way to understand any benefit that may accrue from the 2015 Rule would be to compare the cost and benefits from imposing new federal regulations with the benefits of existing State and local regulations. Yet, the 2015 Economic Analysis never acknowledged the existence of State or local regulations of non-federal waters or wetlands, much less provided any substantive comparison. Instead, it merely presumed that some benefit accrues from shifting these waters and wetlands from State and local jurisdiction to federal jurisdiction, as if the Agencies were working from a blank slate. Since the Agencies are also considering various alternatives that could preserve portions of the 2015 Rule, 83 Fed. Reg. at 32,249, they should re-calculate the 2015 Rule's cost-benefit analysis to better inform themselves and the public whether any benefits would actually be realized from any aspect of the 2015 Rule when compared to existing State and local regulations.

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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